



**Australian Government**  
**Attorney-General's Department**

**AUSTRALIA'S HUMAN  
RIGHTS FRAMEWORK**

CONSOLIDATION  
OF COMMONWEALTH  
ANTI-DISCRIMINATION LAWS

NOVEMBER 2012

# Human Rights and Anti-Discrimination Bill 2012

## **EXPLANATORY NOTES**

**RESPECT • PROTECT • FULFIL**



**CONSOLIDATION OF COMMONWEALTH  
ANTI-DISCRIMINATION LAWS**

**HUMAN RIGHTS AND ANTI-DISCRIMINATION BILL 2012**

**EXPOSURE DRAFT  
EXPLANATORY NOTES**

November 2012

Attorney-General's Department



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## OVERVIEW OF BILL

### *Outline*

The Human Rights and Anti-Discrimination Bill 2012 (the Bill) will be the single consolidated Commonwealth anti-discrimination law. It will replace the *Age Discrimination Act 2004* (ADA), the *Disability Discrimination Act 1992* (DDA), the *Racial Discrimination Act 1975* (RDA), the *Sex Discrimination Act 1984* (SDA) and the *Australian Human Rights Commission Act 1986* (AHRC Act).

The Bill will make a number of reforms to Commonwealth anti-discrimination law, including implementing many recommendations of the 2008 inquiry of the Senate Standing Committee on Legal and Constitutional Affairs into the Sex Discrimination Act 1984 (SDA Report, see **Appendix A** for a full list of the recommendations).

### *Policy background*

Commonwealth anti-discrimination law has become complex and inconsistent, having developed over four Acts and three decades. Little of this complexity is necessary to achieve the policy aims of the legislation. Rather, the difficult and inconsistent drafting of the Acts has made compliance unnecessarily burdensome and has diminished the laws' potential to promote attitudinal change.

As with current discrimination law, the Bill will:

- make discrimination, sexual harassment and racial vilification unlawful
- provide a mechanism for making complaints in relation to this unlawful conduct or other Commonwealth conduct contrary to human rights, and
- provide for the continuing operation of the Australian Human Rights Commission.

The Bill does not intend to make significant changes to what is unlawful and what is not. However, the Bill makes a number of improvements to the existing anti-discrimination framework to produce a clearer and simpler law. It does so by following five key principles:

- Lift differing levels of protections to the highest current standard, to resolve gaps and inconsistencies without diminishing protections.
- Clearer and more efficient laws provide greater flexibility in their operation, with no substantial change in practical outcome.
- Enhance protections where the benefits outweigh any regulatory impact.
- Voluntary measures that business can take to assist their understanding of obligations and reduce occurrences of discrimination.
- A streamlined complaints process, to make it more efficient to resolve disputes that do arise.

### ***Major changes in the Bill***

The Bill's most significant changes from existing Commonwealth anti-discrimination law are as follows:

- a single, simplified, test for discrimination applying to all attributes (clause 19)
- coverage of additional protected attributes, including:
  - Protections against sexual orientation and gender identity discrimination, and extension of protections against relationship discrimination to same-sex couples in any area of public life (clause 17)
  - Protections for a number of other attributes in the area of work only, to harmonise with protections in the Fair Work Act 2009 and State and Territory anti-discrimination laws (subclause 22(3)), and
  - Recognition of discrimination on the basis of a combination of attributes (clause 19).
- coverage of discrimination and sexual harassment in any area of public life (clause 22).
- a streamlined approach to exceptions, including:
  - a new general exception for justifiable conduct (being conduct which is undertaken in good faith for a legitimate aim, and in a manner proportionate to that aim) (clause 23), and removal of a number of exceptions that clearly fall within this concept
  - an exception for the inherent requirements of the job, applying to all attributes (clause 24)
  - preservation of religious exceptions to support religious freedom, with some limitations where Commonwealth-funded aged care services are provided by religious organisations (clauses 32–33), and
  - a new general exception for compliance with Commonwealth laws, reflecting the role of Parliament in determining the best approach to public policy issues (clause 26).
- additional measures to assist and promote voluntary compliance with the Bill, including:
  - certification by the Australian Human Rights Commission (the Commission) of compliance codes, including codes developed by industry (often known as co-regulation) (clauses 75–78)
  - certification by the Commission that proposed conduct is a special measure to achieve equality (clauses 79–82)
  - extension of the Commission's ability to issue temporary exemptions to all attributes (clauses 83–86)
  - review by the Commission of an organisation's practices for compliance if voluntarily requested by that organisation (but not otherwise) (clauses 64–66), and



- extension of the ability for duty holders to develop voluntary action plans to all attributes (clauses 67–69).
- improvements to the complaints process to improve access to justice, including:
  - a shifting burden of proof once an applicant has established a prime facie case, to recognise that the respondent is best placed to know the reason for an action and to have access to relevant evidence (clause 124)
  - enhanced ability for the Commission to dismiss clearly unmeritorious complaints, and that matters dismissed in this way may proceed to court only by leave of the court (clauses 117 and 121), and
  - provision that parties should bear their own costs for litigation as a default position, with the court retaining a discretion to award costs in the interests of justice (clause 133).
- rationalisation of some functions of the Commission, such as:
  - removing the unfunded position of Human Rights Commissioner, as the functions of this position can be undertaken by other members of the Commission, and
  - aligning the definition of ‘human rights’ with the *Human Rights (Parliamentary Scrutiny) Act 2012*.

### ***Key concepts in the Bill***

This section summarises the key concepts in the Bill in three categories:

- the obligations on duty holders
- flexible mechanisms for promoting compliance with obligations without undue regulatory burden, and
- a just and efficient complaints mechanism that balances access to justice for people with arguable cases of unlawful treatment with the rights of duty holders to avoid vexatious or misconceived allegations.

### **Obligations on duty holders**

Obligations on duty holders can be found in Chapter 2—Unlawful conduct and equality before the law and Division 5 of Part 3-1, which provides for disability standards.

The three key forms of conduct that are prohibited are:

- Discrimination (Part 2-2)
- Sexual harassment (Part 2-3, Division 2), and
- Racial vilification (Part 2-4, Division 3).

The Bill also prohibits four other types of conduct:

- Requesting or requiring information for discriminatory purposes (Part 2-3, Division 4)
- Publishing an intention to engage in unlawful conduct (Part 2-3, Division 5)
- Breach of a disability standard (Part 3-1, Division 5), and
- Victimisation (Part 2-3, Division 6).

In addition, duty holders may be liable:

- where they cause, instruct, induce, aid or permit another person to engage in unlawful conduct (clause 58)
- where a director, employee or agent of the duty holder engages in conduct, unless the duty holder has not taken reasonable precautions and exercised due diligence to avoid the conduct (clause 59), and
- for actions of partners, members of the committee of management of unincorporated associations, or multiple trustees unless the duty holder has taken reasonable precautions and exercised due diligence to avoid the conduct (clause 60).

### *Unlawful discrimination*

Discrimination occurs where:

- a person has a protected attribute or attributes (clause 17), and
- that person has experienced discrimination based on that attribute or those attributes (clause 19) that was not a special measure to achieve equality (clause 21, also see Division 7 of Part 3-1 (special measure determinations))

Discrimination is unlawful if:

- it was connected with an area of public life (clause 22)
- no exception applies to the conduct, such as:
  - the exception for justifiable conduct (clause 23)
  - the exception for the inherent requirements of the job (clause 24)
  - the other exceptions in Division 4 of Part 2-2, and
- the discriminator's conduct was not:
  - in direct compliance with a compliance code (Division 5 of Part 3-1) or disability standard (Division 5 of Part 3-1), or
  - covered by a temporary exemption granted by the Australian Human Rights Commission (Division 8 of Part 3-1).

The complainant bears the burden of establishing the primary elements of discrimination (including the presence of a protected attribute or attributes, unfavourable treatment or imposition of a policy which disadvantages people with that attribute, and connection to an area of public life).

However, in relation to the reasons for the conduct, the Bill introduces a shifting burden of proof (clause 124). Under this rule, the complainant must provide evidence from which the court could decide, in the absence of any other explanation, that the alleged reason is the reason the respondent engaged in the conduct. Once the complainant has discharged this burden, the reason for the conduct will be presumed unless proven otherwise by the respondent.

The respondent bears the burden of establishing defences (including that conduct is a special measure to achieve equality, that it is justifiable or covered by another exception or exemption, or that a compliance code or a disability standard applies) (clause 126).

### *Sexual harassment*

Sexual harassment occurs where:

- someone makes an unwelcome sexual advance or engages in sexual conduct in relation to another person (paragraph 51(1)(a))
- a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person affected by this conduct would be offended, insulted, humiliated or intimidated by the conduct (paragraph 51(1)(b)), and
- the conduct was connected with an area of public life (clause 52).

### *Racial vilification*

Racial vilification occurs where:

- a person engages in conduct that is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people (paragraph 53(2)(a))
- the person engaged in the conduct because the person or persons are of a particular race, or because he or she assumes that to be the case (paragraph 53(2)(b)), and
- the conduct was not undertaken in private (paragraph 53(2)(c)).

However, there are important exceptions to the rule against racial vilification to preserve genuine free speech. Subclause 53(4) provides that the following circumstances do not give rise to racial vilification:

- artistic performances
- statements made for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest
- fair and accurate reporting of events or matters of public interest, and
- fair commentary on matters of public interest if the comment is an expression of a genuine belief held by the person making the comment.

### *Requesting or requiring information for a discriminatory purpose*

It is unlawful to request information for the purpose of unlawfully discriminating, or deciding whether to unlawfully discriminate, against the person that provides the information (clause 52).

Unlawful discrimination need only be one purpose for the request for information, and does not need to be the dominant purpose (clause 8).

### *Publishing etc intention to engage in unlawful conduct*

It is unlawful for a person to publish or display material if it indicates, or could be reasonably understood as indicating that the person intends to engage in unlawful conduct (clause 53).

An exception provides that it is not unlawful:

- to publish or display material for the purpose of discouraging unlawful conduct, or

- to publish fair or accurate reports, or to make a fair comment on a matter of public interest.

### *Victimisation*

In general terms, victimisation is unlawful where a person is untreated unfavourably because:

- the person is asserting a right under the Bill or taking action against an alleged discriminator, and related matters
- the person is proposing to assert a right or take action
- an associate of the person, or another person on that person's behalf, is asserting a right or taking an action, or
- the alleged discriminator believes that this is the case.

The prohibited reasons above need only be one reason for the unfavourable treatment and do not need to be the dominant reason (clause 8).

Subclause 54(2) provides a new exception allowing unfavourable treatment of complainants where their conduct was not in good faith. The exception does not apply where a person is merely proposing, or is believed to be proposing, to do any of the actions listed in paragraph 54(1)(a) relating to a complaint.

### *Disability standards*

A 'disability standard' is an instrument made by the Minister to specify requirements to be complied with in relation to disability and one or more areas of public life (clause 70).

A disability standard may provide for exceptions or for the Commission to grant exemptions from requirements specified in the standard (subclause 70(3)).

Conduct in accordance with a disability standard is not unlawful discrimination on the ground of a disability that is covered by that standard (clause 72). It is unlawful to contravene a requirement of a disability standard (clause 73).

Clause 74 provides that the exceptions and exemptions provisions of Chapter 2 and Division 8 of Part 3-1 do not apply in relation to disability standards, other than as provided in a standard.

### **Measures to assist compliance**

Chapter 3 of the Bill provides for a number of mechanisms to assist compliance with anti-discrimination obligations. All of these are voluntary.

The first set of measures provide greater guidance as to the application of the Bill but do not affect potential liability under the Bill. These measures will assist business to understand their obligations under Commonwealth anti-discrimination law, and provide them with an opportunity to promote their efforts towards compliance to interested members of the community. These include:

- Guidelines issued by the Commission (Part 3-1, Division 2)
- Review of policies by the Commission to assist compliance (Part 3-1, Division 3), and

- Action plans (Part 3-1, Division 4).

Other measures will protect duty holders from liability to the extent that they apply to their conduct, but do not impose mandatory obligations. These measures are designed to provide both certainty and incentives for business to improve their anti-discrimination compliance over time. They include:

- Compliance codes (Part 3-1, Division 6)
- Special measure determinations (Part 3-1, Division 7), and
- Temporary exemptions (Part 3-1, Division 8).

Finally, disability standards (Part 3-1, Division 5) provide certainty and clarity about obligations arising under the prohibition of disability discrimination, while also imposing set targets which must be met. Compliance with a disability standard will protect duty holders from liabilities arising under the general prohibition of discrimination. Failure to comply with a disability standard is itself unlawful. There are currently three disability standards in operation in the areas of education (*Disability Standards for Education 2005*), public transport (*Disability Standards for Accessible Public Transport 2002*), and access to premises (*Disability (Access to Premises-Buildings) Standards*). These existing standards will continue in operation as standards under the new Bill.

The introduction of compliance codes will for the first time allow industry to develop voluntary codes specific to their industry. In industries with unusual or technically complex requirements, such as the railway industry, this mechanism will allow development of clear guidance on compliance with anti-discrimination obligations taking into account the peculiar requirements of the industry. Compliance with a code will provide a defence to a claim of unlawful discrimination. To ensure that there will be no diminution of protections, the Commission is required, in making the code, to ensure it is consistent with the objects of the Bill (see subclause 76(2)).

Codes could also be used to provide a more general understanding for business of some of the more technical aspects of the Bill, such as vicarious liability. That is, it could be desirable to provide greater guidance on what constitutes reasonable steps and due diligence to ensure, if followed, an employer is not liable for the actions of a rogue employee.

### **Resolution of complaints**

All complaints under the Bill, both complaints of unlawful conduct and complaints alleging that Commonwealth conduct is contrary to human rights, will follow a streamlined process.

The process for making a single complaint is as follows:

- A complaint is made to the Commission (clause 88).
  - Complaints may be made by a person or persons who believe that they have suffered discrimination on their behalf or on behalf of themselves and other aggrieved persons, or by an industrial association on behalf of a person or persons (clause 89).
  - Generally, complaints should be made within 12 months of the conduct complained of. Failure to comply with this requirement may lead to the Commission closing the complaint (paragraph 117(1)(d)).

- The Commission must either (clause 105):
  - refer the complaint to a more appropriate body (Division 3 of Part 4-2)
  - investigate the complaint
  - conciliate the complaint
  - both investigate and conciliate the complaint, or
  - close the complaint (clause 117).
- If the complaint cannot be resolved by the Commission through conciliation:
  - Complaints alleging unlawful conduct will be closed, and a person affected by the alleged conduct may pursue their claim in the Federal Magistrates Court or Federal Court of Australia (clause 120) within 60 days of the closure of the complaint (clause 123).
  - Complaints of Commonwealth conduct contrary to human rights do not give rise to a right of action in court. Instead, the Commission must make a finding on whether the conduct is Commonwealth conduct contrary to human rights (clause 113). If the Commission finds that the conduct was contrary to human rights, it may provide the report to the Minister (clause 115).
- Leave is required to apply to the Court where the complaint was closed by the Commission on the following grounds (clause 121):
  - the Commission is satisfied that the conduct to which the complaint relates is not unlawful conduct
  - the complaint was made more than 12 months after the alleged conduct occurred (or most recently occurred)
  - the Commission is satisfied that the complaint is frivolous, vexatious, misconceived or lacking in substance
  - if some other remedy has been sought in relation to the subject matter of the complaint—the Commission is satisfied that the subject matter of the complaint has been adequately dealt with, or
  - the Commission is satisfied that some other more appropriate remedy in relation to the subject matter of the complaint is reasonably available to the affected parties.
- If the Court ultimately finds that unlawful discrimination has occurred, it may make any order it considers appropriate (clause 125).

## **CLAUSES IN DETAIL**

### **Chapter 1—Introduction**

#### **Part 1-1—Preliminary**

##### **Division 1—Short title and commencement**

###### Clause 1—Short title

1. This Act may be cited as the Human Rights and Anti-Discrimination Bill 2012.

###### Clause 2—Commencement

###### *Overview*

2. This clause provides that clauses 1 and 2 in the Bill will commence on the day after the Act receives the Royal Assent.
3. This clause also outlines that clauses 3 to 208 will commence on a day fixed by Proclamation, or at the end of 12 months after Royal Assent if the provisions have not commenced earlier.

###### *Analysis*

4. In order to enable a number of instruments to be made and to give users of the law adequate time to familiarise themselves with the new legislation, it was considered more appropriate to provide 12 months lead time, rather than six months as is usually the case.

##### **Division 2—Objects of this Act**

###### Clause 3—Objects of this Act

###### *Overview*

5. Clause 3 provides the objects of the Bill, and lists the relevant human rights and ILO instruments.
6. Clause 3(1)(a) provides that an object of the Bill is to eliminate unlawful discrimination, sexual harassment and racial vilification, consistent with Australia's obligations under human rights instruments and ILO instruments.
7. Clause 3(1)(b) provides that an object of the Bill is to, in conjunction with other laws, give effect to Australia's obligations under the human rights and ILO instruments.
8. Clause 3(1)(c) provides that an object of the Bill is to provide for the continued existence of the Australian Human Rights Commission as Australia's national human rights institution.

9. Clause 3(1)(d) provides that an object of the Bill is to promote recognition and respect for formal and substantive equality, and the inherent dignity of all people.
10. Clause 3(1)(e) provides that an object of the Bill is to recognise that achieving substantive equality may require the taking of special measures or making of reasonable adjustments.
11. Clause 3(1)(f) provides that an object of the Bill is to enable complaints alleging unlawful conduct to be resolved in a way that emphasises alternative dispute resolution, promotes just outcomes and is low-cost and accessible.
12. Clause 3(1)(g) provides that an object of the Bill is to encourage and facilitate compliance with the Act.
13. Clause 3(2) defines human rights instruments by listing the seven core United Nations human rights instruments. This definition aligns with the definition of human rights in the Human Rights (Parliamentary Scrutiny) Act.
14. The interpretative note that sits under this clause explicitly provides that anti-discrimination law should be interpreted in accordance with the objects of the Act.

*Previous provisions*

<b>New provision</b>	<b>Old provision(s)</b>
Clause 3	Section 3, ADA
	Section 3, DDA
	Preamble, RDA
	Preamble, Section 3, SDA

*Analysis*

15. Under the current Commonwealth anti-discrimination regime, the ADA, DDA, RDA and SDA contain different objects clauses tailored to address the specific attribute(s) protected by those Acts.
16. Clause 3 provides a uniform objects clause that applies to all attributes protected under the Bill. It provides a clear statement of the principles underpinning the Bill.
17. Paragraph 3(1)(a) provides that an object of the Bill is to eliminate unlawful discrimination. The ADA, DDA and SDA have a similar objects clause with the caveat to eliminate discrimination ‘as far as possible’. Paragraph 3(1)(a) does not include this caveat, and represents the Government’s clear commitment to eliminate unlawful discrimination, sexual harassment and vilification. This clause implements recommendation 1 of the SDA Report.
18. Paragraph 3(1)(b) recognises the importance of fulfilling Australia’s obligations under the relevant human rights treaties and ILO instruments. As the courts are already required to interpret legislation consistently with Australia’s obligations under international law, this change has only a minimal practical impact. This clause also implements recommendation 2 of the SDA Report.



19. Paragraph 3(1)(c) recognises the Commission as Australia’s national human rights institution, as well as the importance of the Commission’s powers to educate the community about anti-discrimination law.
20. Paragraph 3(1)(d) reflects the core human rights underpinning anti-discrimination law as the right to equality and the inherent dignity of all people. ‘Formal equality’ requires that people be treated the same, regardless of their irrelevant personal attributes. ‘Substantive equality’ takes into account the effects of historical disadvantage and recognises that relevant personal attributes may need to be taken into account and accommodated in order to achieve equal opportunity.
21. Paragraph 3(1)(e) makes it clear that in order to eliminate unlawful discrimination, positive steps may be needed to address structural barriers to equality and historical disadvantage.
22. Paragraph 3(1)(f) emphasises the importance of access to justice principles.
23. Paragraph 3(1)(g) emphasises that the Bill is a tool to both educate and promote understanding of anti-discrimination principles. Many measures in the Bill (see Chapter 3) are aimed at encouraging wider compliance with anti-discrimination law through tools to assist individuals and organisations to better understand and comply with anti-discrimination law. The emphasis on compliance to avoid disputes is also in keeping with the Access to Justice Framework.
24. Subclause 3(2) provides that the human rights instruments are the seven core human rights instruments to which Australia is a party, as follows:
  - the International Convention on the Elimination of All Forms of Racial Discrimination
  - the International Covenant on Economic, Social and Cultural Rights
  - the International Covenant on Civil and Political Rights
  - the Convention on the Elimination of All Forms of Discrimination Against Women
  - the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
  - the Convention on the Rights of the Child, and
  - the Convention on the Rights of Persons with Disabilities
25. These seven instruments underpin Australia’s Human Rights Framework. These instruments are relevant to other areas of the Bill:
  - constitutional basis for the Bill
  - definition of human rights for:
    - the Commission’s general functions
    - complaints of Commonwealth conduct contrary to human rights (but not ICESCR), and
    - inquiries.

26. This clause also ensures consistency in the definition of human rights in Commonwealth law and reflects a consolidation of the instruments underpinning the current discrimination Acts. Subclause 3(3) reflects a number of International Labour Organization conventions relating to anti-discrimination which Australia has ratified and which are given domestic effect by anti-discrimination law. Both clauses recognise the importance of Australia fulfilling its obligations under these instruments.
27. The interpretative note was included to guide courts' approaches to anti-discrimination law by making it clear that it should be given an interpretation consistent with the law's beneficial purposes. This also implements, in-principle, recommendation 3 of the SDA report. Given that section 15AA of the *Acts Interpretation Act 1901* provides that Acts must be interpreted in accordance with their objects, it is not necessary to include a specific provision to this effect.

### **Division 3—Guide to this Act**

#### Clause 4—Guide to this Act

28. Clause 4 provides a guide to the Bill. This clause provides an overview of each Chapter in the Bill and highlights the key Parts and Divisions for each.

### **Part 1-2—Interpretation**

#### **Division 1—Guide to this Part**

#### Clause 5—Guide to this Part

29. Clause 5 provides a guide to Part 1-2 of the Bill.

#### **Division 2—Interpretation**

#### Clause 6—The dictionary

30. Clause 6 contains definitions of concepts that are used throughout the Bill in a central location—many of these definitions have been maintained from the existing Acts. The definitions are explained in this document in the context of the clause to which they are relevant.

#### Clause 7—Meaning of *connected with* an area of public life etc.

#### *Overview*

31. The concept of being 'connected with' an area of public life is defined by clause 7 to broadly include any conduct engaged in in the course of, for the purpose of, or in relation to, an area of public life.

*Analysis*

32. Clause 7 is included as an interpretive tool to assist in relation to whether conduct is connected with an area of public life. Clause 22 outlines when discrimination is unlawful—it is unlawful for a person to discriminate against another person if the discrimination is connected with any area of public life.

Clause 8—Multiple reasons or purposes for conduct

*Overview*

33. Clause 8 provides that a person or body engages in conduct for a particular reason or for a particular purpose if:
- that reason is the sole reason or one of the reasons why the person or body engages in the conduct, or
  - that purpose is the sole purpose, or one of the purposes for which the person engages in the conduct.
34. Subclause 8(2) notes that subsection 8(1) has effect subject to any express contrary intention stated in the Bill.

*Previous provisions*

<b>New provision</b>	<b>Old provision</b>
Clause 8	Section 16, ADA
	Section 10, DDA
	Section 18, RDA
	Section 8, SDA

*Analysis*

35. This provision preserves existing policy in one streamlined provision.

**Part 1-3—Application of this Act**

**Division 1—Guide to this Part**

Clause 9—Guide to this Part

36. Division 1 provides a guide to Part 1-3 of the Bill.

## **Division 2—Geographical application**

### Clause 10—Act applies throughout Australia

#### *Overview*

37. This Bill applies throughout Australia and applies to conduct engaged in in Australia, even if the conduct involves persons or things, or matters arising, outside Australia.

#### *Previous provisions*

<b>New provision</b>	<b>Old provision</b>
Clause 10	Section 9, ADA
	Section 12, DDA
	Section 4, RDA
	Section 9, SDA

#### *Analysis*

38. This maintains existing policy from the current Acts. This means while the Bill applies throughout Australia, it does not apply to activities outside of Australia, such as engaging staff at an overseas embassy where the decision is made overseas.

## **Division 3—Constitutional basis**

### Clause 11—Main constitutional basis: external affairs

#### *Overview*

39. Clause 11 provides that the Bill has effect to the extent that it is supported by the external affairs power in the Constitution. Most importantly, the Bill relies on the seven core international human rights treaties and four ILO treaties referred to in subclauses 3(2) and (3) of the Bill.

#### *Previous provisions*

<b>New provision</b>	<b>Old provision</b>
Clause 11	Subsection 10(7), ADA
	Subsection 12(8), DDA
	Subsection 9(10), SDA

40. The preamble to the RDA mentions the International Convention on the Elimination of all Forms of Racial Discrimination but the RDA does not have a constitutional application similar to any of the provisions of Division 3 of Part 1-3 of the Bill.

## *Analysis*

41. Commonwealth anti-discrimination case law relies on a range of constitutional powers to apply to the maximum extent possible throughout Australia. All of the Acts which have constitutional application provisions rely on the external affairs power, amongst others.
42. The Bill singles out external affairs as the main constitutional basis given the important role of the Bill in implementing Australia's international law obligations and because the external affairs power is the only constitutional head of power which supports the full application of all provisions of the Bill.
43. The constitutional basis of the RDA was not previously explicitly stated in the operative provisions of that Act.

## Clause 12—Other constitutional bases

### *Overview*

44. Subclause 12(1) provides that without limiting clause 11 which is reliant on the external affairs power, the Bill has effect to the extent directly supported by a number of other heads of constitutional power.
45. Subclause 12(2) relies on the corporations power to apply the Bill to the conduct of corporations and their officers, employees or agents (paragraphs (a) and (b)), as well as conduct suffered by officers, employees or agents of corporations (paragraph (c)), where the conduct is connected with the person's duties as an officer, employee or agent of the corporation.
46. Subclause 12(3) relies on the commonwealth and territory matters power to apply the Bill to the conduct of the Commonwealth, a Territory, a Commonwealth authority or a Territory authority and their officers (paragraphs (a) and (b)), as well as conduct suffered by officers, employees or agents of the Commonwealth, a Territory, a Commonwealth authority or a Territory authority (paragraph (c)), where the conduct is connected with the person's duties as an officer, employee or agent of the Commonwealth or a Territory. Paragraph 12(3)(d) also extends to conduct occurring in the course of the performance of a function or exercise of a power under a Commonwealth or Territory law; and to conduct that is engaged in within a Territory (paragraph (e)).
47. Subclause 12(4) relies on the trade or commerce power to apply the Bill to conduct engaged in while the first person, or the other person, is acting in the course of, or in relation to, trade or commerce:
  - between Australia and places outside Australia
  - among the States
  - between a State and a Territory, or
  - between 2 Territories.
48. Subclause 12(5) relies on the banking and insurance power to apply the Bill to conduct engaged in while the first person, or the other person, is acting in the course of, or in relation to, the carrying on of:

- the business of banking, other than State banking (within the meaning of paragraph 51(xiii) of the Constitution) not extending beyond the limits of the State concerned, or
- the business of insurance, other than State insurance (within the meaning of paragraph 51(xiv) of the Constitution) not extending beyond the limits of the State concerned.

49. Subclause 12(6) relies on the telecommunications power to apply the Bill to a person engaging in conduct in relation to another person by means of a postal, telegraphic, telephonic or other like service within the meaning of paragraph 51(v) of the Constitution.

*Previous provisions*

<b>New provision</b>	<b>Old provision</b>
Clause 11	Section 10, ADA
	Section 12, DDA
	Section 9, SDA

*Analysis*

50. This provision is similar in effect to the existing provisions in the ADA, DDA, and SDA, and provides a more explicit statement of the constitutional basis of the RDA.

Clause 13—Act not to apply so as to exceed Commonwealth power

*Overview*

51. Clause 13 is a further constitutional safety net for the Bill.
52. It provides that where a provision of the Bill may have a valid application, as well as an invalid application, the provision should have the valid application but not the invalid application.
53. However, this clause will not apply where it is clear that Parliament’s intention was that the Bill should only apply if the invalid applications applied, or where the provision’s operation in relation to the valid application would differ substantially from how it would have operated if the invalid applications had also applied.

*Previous provisions*

54. This is a new provision.

*Analysis*

55. This provision has been inserted to ensure the Bill has the maximum possible valid operation which does not fundamentally alter Parliament’s intention in enacting the Bill. It is commonly included in other legislation of broad application (eg section 38 of the *Fair Work Act 2009*).

## **Division 4—Interaction with State and Territory laws**

### Clause 14—Interaction with State and Territory anti-discrimination laws

#### *Overview*

56. Subclause 14(1) provides that this Bill is not intended to exclude or limit the operation of a State or Territory anti-discrimination law, to the extent that that law is capable of operating concurrently with this Bill. This is a clear statement that the Bill is not intended to cover the field and override State and Territory anti-discrimination laws.
57. Subclause 14(2) provides that subclause 14(1) does not apply in relation to the provisions relating to disability standards and compliance codes.

#### *Previous provisions*

<b>New provision</b>	<b>Old provision</b>
Clause 14	Section 12, ADA
	Section 13, DDA
	Section 6, RDA
	Section 10 and 11, SDA
	Section 4, AHRC Act

#### *Analysis*

58. This approach preserves existing policy but with streamlined drafting. The clause does not include specific reference to State and Territory laws which further the objects of an international Convention, which was included in the RDA and SDA and created complexity. In practice, as each of the State and Territory anti-discrimination laws already achieve this, this will have no change in policy.
59. Subclause 14(2) is necessary to ensure that disability standards and compliance codes can provide a complete defence to both Commonwealth anti-discrimination law and State and Territory anti-discrimination law. Ensuring a complete defence is an important part of encouraging organisations to develop co-regulatory mechanisms such as standards and codes which provide greater certainty of obligations.
60. Subclause 14(3) provides a prescription mechanism for the definition of a State or Territory anti-discrimination law. The ability to prescribe particular State or Territory laws by regulation ensures greater flexibility as it allows the definition to be updated from time-to-time as State or Territory laws change.

## **Division 5—Miscellaneous**

### Clause 15—Act binds Crown

#### *Overview*

61. Clause 15 provides that the Bill will bind the Crown in each of its capacities, but the Bill will not make the Crown liable to be prosecuted for an offence.

#### *Previous provisions*

<b>New provision</b>	<b>Old provision</b>
Clause 15	Section 13, ADA
	Section 14, DDA
	Section 6, RDA
	Section 12, SDA
	Section 6, AHRC Act

#### *Analysis*

62. This is consistent with the position under the current Acts, other than the SDA.
63. The SDA currently does not apply to the Crown in right of a State in relation to provisions relating to employment. It is not clear why the SDA took this approach while earlier and later Acts did not.
64. To ensure a single application provision for the entire Bill, while minimising change and taking the current highest standard, the Bill will apply consistently to the Crown in all its capacities. This implements recommendation 11 of the SDA Report. In practice, as all States and Territories have legislation prohibiting sex discrimination, sexual harassment and other matters covered by the SDA, this change will have little practical impact.



## **Chapter 2—Unlawful conduct and equality before the law**

### **Part 2-1—The protected attributes**

#### **Division 1—Guide to this Part**

65. Division 1 provides a guide to Part 2-1 of the Bill.

#### **Division 2—The protected attributes**

##### Clause 17—The protected attributes

###### *Overview*

66. The Bill will make it unlawful to discriminate against a person on the basis of a ‘protected attribute’. Protected attributes include aspects of an individual that cannot change (such as race or social origin) and attributes that may change over time (such as disability, age, marital status, or political opinion). Clause 17(1) specifies the protected attributes for the purposes of the Bill. The list includes:
- the grounds covered by the four existing anti-discrimination Acts
  - the new grounds of sexual orientation and gender identity (and an extension of the ground of ‘marital status’ to ‘marital or relationship status’ to include same-sex relationships), and
  - other grounds covered under the ‘equal opportunity in employment’ complaints scheme in the AHRC Act (either through inclusion in the definition of ‘discrimination’ in section 3 of the AHRC Act or prescribed in regulation 4 of the *Australian Human Rights Commission Regulations 1989* (AHRC Regulations), but only covered in work only (see subclause 22(3)).
67. A protected attribute also includes any characteristics that people with the attribute generally have or are assumed to have (paragraph 17(2)(a)), or characteristics that the particular person has because he or she has the attribute (paragraph 17(2)(b)).
68. For example, it may be generally assumed that it is a characteristic of women of working age that they may become pregnant. Discrimination against a woman on the basis that she might become pregnant would be both discrimination on the basis of sex (paragraph 17(1)(p)) and potential pregnancy (paragraph 17(1)(l)).
69. Similarly, if a person undergoing treatment for cancer (a disability) lost their hair due to their treatment, discrimination against that person on the basis of their hair loss would be discrimination on the basis of their disability because the hair loss is a characteristic they had because of their disability (paragraph 17(1)(c)).

*Previous provisions*

<b>Protected attribute</b>	<b>Act(s)</b>	<b>Provision(s)</b>
Age	ADA	Age is covered as a protected attribute under sections 14 and 15 of the ADA.
Breastfeeding	SDA	Breastfeeding is covered as a protected attribute under section 7AA of the SDA.
Disability	DDA	Disability is covered as a protected attribute under sections 5 and 6 of the DDA.
Family responsibilities	SDA	Family responsibilities are covered as a protected attribute in relation to work only under section 7A of the SDA.  Family responsibilities will continue to be a protected attribute in relation to work only (see subclause 22(3)).
Gender identity	New ground	
Immigrant status	RDA	Immigrant status is covered as a protected attribute under section 5 of the RDA.
Industrial history	AHRC Act (as 'trade union activity')	Trade union activity is part of the 'equal opportunity in employment' scheme under the AHRC Regulations.  Industrial history will be a protected attribute in relation to work only (see subclause 22(3)).
Marital or relationship status	SDA, currently covers 'marital status'	Marital status is covered as a protected attribute under section 6 of the SDA, although same-sex relationship status not previously covered.
Medical history	AHRC Act, (as 'medical record')	Medical record is part of the 'equal opportunity in employment' scheme under the AHRC Regulations.  Medical history will be a protected attribute in relation to work only (see subclause 22(3)).
Nationality or citizenship	AHRC Act, (as 'nationality')	Nationality is part of the 'equal opportunity in employment' scheme under the AHRC Regulations.  Nationality or citizenship will be a protected attribute in relation to work only (see subclause 22(3)).

<b>Protected attribute</b>	<b>Act(s)</b>	<b>Provision(s)</b>
Political opinion	AHRC Act	Political opinion is part of the 'equal opportunity in employment' scheme under the AHRC Act. Political opinion will be a protected attribute in relation to work only (see subclause 22(3)).
Potential pregnancy	SDA	Potential pregnancy is covered as a protected attribute under section 7 of the SDA.
Pregnancy	SDA	Pregnancy is covered as a protected attribute under section 7 of the SDA.
Race	RDA	Race is covered as a protected attribute under the RDA. Note: 'race' is now defined to include colour, descent or national or ethnic origin, which were previously spelt out as separate grounds in the RDA.
Religion	AHRC Act	Religion is part of the 'equal opportunity in employment' scheme under the AHRC Act. Religion will be a protected attribute in relation to work only (see subclause 22(3)).
Sex	SDA	Sex is covered as a protected attribute under section 5 of the SDA.
Sexual orientation	New ground	This is a new ground. However, sexual preference is part of the 'equal opportunity in employment' scheme under the AHRC Regulations.
Social origin	AHRC Act	Social origin is part of the 'equal opportunity in employment' scheme under the AHRC Act. Social origin will be a protected attribute in relation to work only (see subclause 22(3)).

### *Analysis*

70. The prohibition of discrimination under the current Commonwealth anti-discrimination laws is limited to certain protected attributes. Clause 17(1) lists the protected attributes. Protected attributes are those personal characteristics of an individual which the Bill will protect from discrimination.
71. Under the existing anti-discrimination laws, protections against discrimination on the basis of particular attributes are found in each of the ADA, DDA, RDA and SDA, and also in the equal opportunity in employment provisions in Division 4 of Part II of the

AHRC Act. Discrimination on the basis of the attributes found in the ADA, DDA, RDA and SDA is unlawful. Discrimination on the basis of attributes covered only by the EEO provisions of the AHRC Act is not unlawful, although the Commission may conciliate complaints of discrimination.

72. The separate equal opportunity in employment complaints regime creates confusion and leads to significant regulatory overlap. Permitting complaints in relation to conduct which is not unlawful represents poorly designed regulation. Providing clear remedies will also benefit individuals, who will be able to take binding action if they consider they have been discriminated against.
73. For these reasons, the separate ‘equal opportunity in employment’ complaints scheme has not been maintained. Discrimination on all the attributes currently covered in the equal opportunity in employment regime, with the exception of criminal record, has been made unlawful in relation to work only.
74. In relation to criminal record, the uncertain nature of this concept, and the differences in understanding of what constitutes a relevant or irrelevant criminal record, have made it difficult to assess what costs would result from inclusion of this ground. Consistent with the deregulatory nature of the project, the Bill does not include criminal record as a ground of discrimination.
75. The most significant policy changes in clause 17 are:
  - discrimination on the basis of sexual orientation or gender identity will be unlawful in any area of public life (subclause 22(1)), and
  - discrimination on the basis of industrial history, medical history, and nationality or citizenship will become unlawful in the area of work (subclause 22(3)).
76. Other than the changes noted above, the list of protected attributes in subclause 17(1) reflects the attributes currently protected under Commonwealth anti-discrimination laws.
77. A number of the protected attributes are defined in clause 6, the dictionary, as outlined below.
78. **Age:** age is defined to include age group. This maintains the definition of ‘age’ in section 5 of the ADA.
79. **Breastfeeding:** breastfeeding is defined inclusively to include the act of expressing milk, single acts of breastfeeding, and breastfeeding over a period of time (for example, for a period of months following childbirth). This definition is based on subsections 7AA(3) and (4) of the SDA. The definition is intended to avoid a respondent claiming that their discriminatory act was lawful because the complainant was not actually breastfeeding at the time that the act took place.
80. **Disability:** disability is broadly defined and is intended to include physical, sensory, intellectual and psychiatric impairment, mental illness or disorder, and provisions relating to the presence in the body of organisms causing or capable of causing disease. These provisions have broad application, for example, they are intended to ensure that persons with HIV/AIDS come within the definition of disability. This maintains the broad definition of ‘disability’ in section 4 of the DDA.

81. Paragraph (h) of the definition of disability makes it clear that behaviour that is a symptom or manifestation of a disability is part of the disability. For example, a psychological disability may manifest in unusual behaviour. The provision makes it clear that in assessing the reasons for discrimination, that behaviour must be taken into account as part of the disability. This provision was included in the DDA in 2009 for avoidance of doubt.
82. Paragraph (i) of the definition of disability reproduces the effect of section 8 of the DDA. Section 8 of the DDA protects people with a disability against discrimination based on them possessing or being accompanied by a carer, assistant, assistance animal or disability aid. Having a carer, assistant, interpreter or reader, or an assistance animal or disability aid will now be included within the definition of ‘disability’ itself, as the meaning of discrimination in Division 2 will be streamlined to focus on whether the complainant had a protected attribute.
83. The DDA definition of disability includes a disability which presently exists, that existed in the past and one that may exist in the future. This is designed to include persons whose disability is not yet apparent but which may occur at some time in the future. The definition also includes a disability that is imputed to someone, even though they do not in fact have that disability. These aspects of the definition are now covered by subclause 19(4).
84. **Family responsibilities:** family responsibilities is defined to mean responsibilities of a person to care for or support a child who is wholly or substantially dependent on the person, or any other immediate family member who is in need of care and support. This is based on section 4A of the SDA. Protection for family responsibilities will only extend to discrimination which occurs in connection with work activities (subclause 22(3)). This maintains the present scope of the prohibition of family responsibilities discrimination in the SDA.
85. **Gender identity:** gender identity is introduced in this Bill as a protected attribute at the Commonwealth level. Gender identity will cover people:
- born as one sex who identify as another sex, or
  - born intersex who identify as either sex.
86. The introduction of gender identity as a protected attribute in this Bill matches the highest current standards in State and Territory anti-discrimination law and will be subject to exemptions in clauses 32 and 33 relating to religion.
87. This clause does not require recognition of, or provision of facilities for, people who do not identify as either sex. Protection against discrimination on the basis of gender identity implements recommendation 43 of the SDA report.
88. **Immigrant status:** immigrant status is defined as the status of being an immigrant. This preserves the effect of section 5 of the RDA. Immigrant status is intended to cover situations in which a person who is born in Australia is treated differently from a person who was not, *solely* on that basis. That is, treating a naturalised citizen differently from a citizenship by birth. It is *not* intended to be read as ‘visa status’—that is, it does *not* prohibit differential treatment between people who have a temporary visa from those who have a permanent right to remain in Australia.

89. **Industrial history** is defined in clause 6 of the Bill to mean:

- a person becoming or not becoming, or remaining or ceasing to be, an officer or member of an industrial association (paragraph (a)), and
- doing, or not doing, any of the following:
  - becoming involved in establishing an industrial association
  - organising or promoting a lawful activity for, or on behalf of, an industrial association
  - encouraging, or participating in, a lawful activity organised or promoted by an industrial association
  - complying with a lawful request made by, or with a requirement of, an industrial association
  - representing or advancing the views, claims or interests of an industrial association
  - paying a fee (however described) to an industrial association, or to someone in lieu of an industrial association, and
  - seeking to be represented by an industrial association (paragraph (b)).

90. This definition is based on the concept of ‘engaging in industrial activity’ in section 347 of the *Fair Work Act 2009*, to ensure consistency between the protections afforded by the two Acts in this regard. For example, it would be unlawful for an employer to discriminate against an employee who joined a union, or for an employee to harass other employees because they had refused to join a union.

91. **Marital or relationship status:** the protection against marital status discrimination in the SDA currently protects opposite-sex de facto couples but not same-sex couples. Under this Bill, ‘marital status’ has been extended to ‘marital or relationship status’ to provide coverage for same-sex de facto couples.

92. Coverage of same-sex de facto relationships is consistent with the prohibition of sexual orientation discrimination in this Bill and implements recommendation 4 of the SDA Report.

93. **Medical history:** this is a new ground in Commonwealth anti-discrimination law. Medical history is largely covered by the existing ground of disability. However, discrimination on the basis of highly sensitive medical information that does not constitute a disability (eg relationship counselling) will now be unlawful in work and work-related areas.

94. **Nationality or citizenship:** discrimination on the basis of nationality, although covered by the AHRC Act equal opportunity in employment provisions, is not unlawful at the Commonwealth level. However, it is prohibited by all State and Territory anti-discrimination laws. The Bill will make it unlawful to discriminate on this basis in work and work-related areas. Exceptions for conduct required by other Commonwealth laws (clause 28) will ensure there is no impact on citizenship policy, the Australian Public Service or Defence employment policy, or the provision of work-related benefits to Australian citizens or permanent residents.

95. **Political opinion** is not defined and takes its ordinary meaning. The Bill will make it unlawful to discriminate on this basis in work and work-related areas.
96. **Pregnancy and Potential pregnancy:** pregnancy is not defined and takes its ordinary meaning. Potential pregnancy is defined as the fact that the person is or may be capable of bearing children, has expressed a desire to become pregnant, or is likely, or perceived to be likely, to become pregnant. Discrimination on any of these bases is likely to be sex discrimination. The attributes are included for the avoidance of doubt. These provisions preserve the effect of section 7 of the SDA.
97. **Race:** race is defined in clause 6 to include colour, descent, or national or ethnic origin. Although section 9 of the RDA prohibits discrimination on the basis of descent in all areas of public life, other provisions of the RDA do not extend to descent, including sections 10–16. Inclusion of descent in the definition of race means that descent will apply consistently through all provisions of the Bill.
98. **Religion** is not defined and takes its ordinary meaning. The Bill will make it unlawful to discriminate on this basis in work and work-related areas.
99. **Sex** is not defined and takes its ordinary meaning.
100. **Sexual orientation:** sexual orientation is introduced in this Bill as a protected attribute at the Commonwealth level, subject to religious exemptions in clauses 32 and 33. This implements part of SDA Report recommendation 43. Sexual orientation is protected in all other Australian anti-discrimination laws. Inclusion of the ground in the Bill will rectify the anomalous failure to protect this attribute fully at the Commonwealth level.
101. Sexual orientation is defined in clause 6 to mean a person’s sexual orientation towards persons of the same or opposite sex, or to persons of either sex. The Bill does not use ‘labels’, such as homosexuality, lesbianism, bisexuality or heterosexuality, which some people find offensive and can be inaccurate. However, it is intended that the definition covers each of these sexual orientations.
102. **Social origin** is not defined and takes its ordinary meaning. The Bill will make it unlawful to discriminate on this basis in work and work-related areas.

## **Part 2-2—Discrimination**

### **Division 1—Guide to this Part**

#### Clause 18—Guide to this Part

103. Clause 18 provides a guide to Part 2-2 of the Bill.

### **Division 2—Meaning of discrimination**

#### Clause 19—When a person *discriminates* against another person

##### *Overview*

104. Clause 19 establishes the key definition of discrimination that applies throughout the Bill. Discrimination may arise in two ways, both of which may arise from the same set of facts:

- Discrimination may arise where a person treats another person unfavourably (ie to their detriment) because the other person has a particular protected attribute or attributes (subclause 19(1)). This situation is commonly referred to as ‘direct discrimination’.
- Discrimination may also arise where people with a particular attribute or attributes are disadvantaged by a policy (subclause 19(3)). The policy itself may be apparently neutral. This situation is commonly referred to as ‘indirect discrimination’.

105. The Bill intentionally does not preserve the terms ‘direct’ and ‘indirect’ discrimination. This is to remove any perception that the two concepts are mutually exclusive (which is reinforced by subclause 19(7) which reiterates that the two do not limit each other). The Bill recognises discrimination can take two different forms, but that both are equally ‘discrimination’ and prohibited by the Bill.

106. Subclause 19(1) provides that the elements of discrimination are:

- A person must have a protected attribute or attributes.
- The alleged discriminator must treat, or propose to treat, the person unfavourably. It is not necessary to make a comparison to any other person to determine whether treatment is unfavourable. It is sufficient that the treatment is detrimental to the person.
- The treatment or proposed treatment must be because the person has a protected attribute or attributes. It is not necessary to have a discriminatory motive or for the person’s attribute to be the dominant reason for their treatment. It is only necessary to establish that their protected attribute was one reason for their detrimental treatment (clause 8). A shifting burden of proof applies to this element (clause 126).

107. For avoidance of doubt, subclause 19(2) provides that unfavourable treatment includes harassment, and other conduct that offends, humiliates, insults or intimidates the other person. This conduct imposes a detriment on a person because of his or her attribute and



would therefore be discrimination under subclause 19(1). The harassment itself does not need to relate to the protected attribute. It is sufficient that the offensive conduct is targeted at the person because of their attribute. For example, if a shopkeeper is persistently abusive towards people of a particular racial background, it will be clear that he or she was harassing these clients on the basis of their race notwithstanding the lack of racial epithets in his or her abuse. This largely reflects the existing law, as brought out by case law. There is no longer separate provision for attribute-based harassment as there is in Division 3 of the DDA.

108. Sexual harassment, which is prohibited by clause 51, is broadly-speaking a subset of the conduct referred to in subclause 19(2). The inclusion of clause 51 is not intended to prevent the possibility of pursuing a claim of sex-based harassment that does not include sexual conduct.

109. Subclause 19(3) also provides that discrimination can be made out with the following elements:

- a person must have a protected attribute or attributes
- the alleged discriminator must impose, or propose to impose, a policy, and
- that policy must have, or be likely to have, the effect of disadvantaging people with a particular protected attribute or attributes.

110. 'Policy' is defined in clause 6 to include a condition, requirement, or practice. It is intended that this term should be interpreted broadly to include any conduct that has the potential to disadvantage the position of a person with a protected attribute.

111. An example of this form of discrimination is a 'no hats' policy. This policy is not on its face directed at any particular attribute. However, it has the effect of disadvantaging groups of people such as Sikhs, who are required by their religion to wear head coverings and thus cannot comply with the policy.

112. Subclause 19(4) extends the meaning of having a protected attribute in a number of important ways. The result is to prohibit discrimination in the following situations:

- an associate of the person has the attribute (for example, a person is refused entry to a club because they are with someone who is Asian)
- the person, or an associate, had the attribute in the past (for example, a person is not employed because of a history of mental illness)
- the person, or an associate, may in the future have the attribute (for example, not permitting an employee to go on training because they will soon reach retirement age), and
- assuming the person, or an associate, has the attribute (for example, it would be unlawful for an employer to discriminate against an employee because they assumed that the employee was homosexual, even though the employee was in fact heterosexual).

113. Subclauses 19(5) and (6) provides technical definitions to aid interpretation of other provisions of the Bill.

*Previous provisions*

<b>New provision</b>	<b>Old provision(s)</b>
Subclause 19(1)	Section 14, ADA
	Section 5, DDA
	Subsection 9(1), RDA
	Subsections 5(1), 6(1), 7(1), 7AA(1) and 7A(1), SDA
Subclause 19(2)	Sections 35–39, DDA
Subclause 19(3)	Section 15, ADA
	Section 6, DDA
	Subsection 9(1A), RDA
	Subsection 5(2), 6(2), 7(2), and 7AA(2)
Subclause 19(4)	Section 4, DDA definition of ‘disability’ and sections 11, 13 and 15, RDA (concept of ‘associate’)

*Analysis*

114. The new definition of discrimination in clause 19 is not intended to change the underlying policy that was expressed in previous Commonwealth anti-discrimination legislation.

115. However, the existing definitions of discrimination are inconsistent, difficult to understand and apply, and have been widely criticised. The Bill introduces a simplified and streamlined definition of discrimination to make it as easy as possible for duty holders to understand what is required to comply with the Bill.

116. In relation to discrimination by unfavourable treatment, the most difficult area of previous tests has been the comparator element. The comparator element requires the identification of a person in the same circumstances as the complainant, but for the protected attribute. This person is almost always hypothetical. The complainant’s treatment is then compared against the treatment of the comparator to determine whether discrimination has occurred. The complexity and uncertainty of this exercise has led to inconsistent and difficult case law.

117. To avoid these difficulties, the Bill defines discrimination by reference to unfavourable treatment only, rather than requiring the construction of a comparator. However, in many cases, a comparative analysis will be useful to determine whether the unfavourable treatment was *because of* the protected attribute.

118. Adoption of this ACT test implements recommendation 5 of the SDA Report.

119. The definition of discrimination by imposition of a policy is based on existing models in Commonwealth anti-discrimination law. It does not include the requirement of some versions of the test (the DDA and RDA) that the complainant not be able to comply with the policy. In practice, this requirement was often read down to merely require that the

policy would seriously disadvantage the complainant or that the complainant was not ‘practically able’ to comply.

120. Existing versions of the test for discrimination by imposition of a policy include an exception where the policy is reasonable (for example, section 7B, SDA). This exception is not reproduced, as it has been replaced by a general exception for justifiable conduct applying to all forms of discrimination (clause 23).

121. The Bill also explicitly covers discrimination on the basis of a combination of attributes. This ensures that where a person has two or more attributes (for example, an Asian woman, an Indigenous person with a hearing impairment, an elderly woman), that person is able to demonstrate unfavourable treatment because of the individual attributes or as a result of the combination of the attributes. For example, an Asian woman may not be able to demonstrate unfavourable treatment of Asians generally or women generally, but that an employer based a decision on being an Asian woman.

122. The requirement to separately demonstrate race discrimination or sex discrimination in circumstances such as these has proved difficult under the existing Acts. While this is at least partially addressed through the consolidation process and including all attributes in the same Bill, the explicit protection of discrimination based on a combination of two or more attributes recognises that people with multiple attributes often face compounded discrimination. It also ensures that special measures to achieve equality (see clause 22 below) can be taken to achieve equality for a target group that is defined by more than one attribute.

#### Clause 20—Proposed conduct

##### *Overview*

123. Clause 20 is an interpretive provision to clarify that in determining whether proposed conduct constitutes discrimination, the analysis should be done as though the conduct had actually occurred.

##### *Previous provisions*

124. This provision preserves and clarifies existing policy.

##### *Analysis*

125. This provision preserves existing policy.

#### Clause 21—Special measures to achieve equality are not discriminatory

##### *Overview*

126. Clause 21 provides that special measures to achieve equality are not discrimination.

127. Special measures are laws, policies or programs that are necessary to help a disadvantaged group achieve equality with the broader community. For example, programs aimed at encouraging Indigenous people to undertake higher education will be special measures to achieve equality given the historical disadvantage of Indigenous people, in particular in educational outcomes.

128. A law, policy or program will be a special measure to achieve equality where:

- the law, policy or program is made in good faith for the sole or dominant purpose of advancing substantive equality for people, or a class of people
- those people have a particular protected attribute or attributes, and
- a reasonable person in the circumstances of the person or body making the law, policy or program would have considered that the law, policy or program was necessary to advance substantive equality.

129. The test for discrimination builds in a number of safeguards to ensure that this provision is not abused to justify discrimination or measures that are intended to disadvantage particular groups. Special measures must be undertaken in good faith, must have the purpose of advancing substantive equality, and it is necessary to demonstrate that a reasonable person in the position of the measure-taker would have considered that the special measure was necessary.

130. Special measures will cease to satisfy the test in clause 21 once substantive equality has been achieved (subclause 21(4)). However, some special measures address more permanent special needs (eg measures to ensure equal access for people with disability, maternity leave schemes), which means that substantive equality can only be achieved through the maintenance of those measures. Special measures addressing the particular needs of those groups are likely to be valid indefinitely.

*Previous provisions*

<b>New provision</b>	<b>Old provision</b>
Clause 21	Section 33, ADA
	Section 45, DDA
	Subsection 8(1), RDA
	Section 7D, SDA

*Analysis*

131. The existing provisions for special measures are complex and differ across the existing Acts. The Bill contains a single, simplified special measures test which applies across all attributes. The test maintains the existing policy from the existing Acts, such that any law or policy which could constitute a special measure under the existing Acts would also constitute a special measure under the Bill.

132. Division 7 of Part 3-1 of the Bill provides for the Commission to determine that particular policies are special measures, in order to provide greater certainty to duty holders seeking to implement special measures to achieve equality.

### **Division 3—When discrimination is unlawful**

#### Clause 22—When discrimination is unlawful

##### *Overview*

133. Subclause 22(1) provides that discrimination against another person is unlawful if it is connected with any area of public life. The concept of being ‘connected with’ an area of public life is defined in clause 7 of the Bill to broadly include any conduct engaged in in the course of, for the purpose of, or in relation to, an area of public life.

134. Subclause 22(2) provides a non-exhaustive list of areas of public life to support subclause 22(1). The areas identified are consistent with the areas regulated by existing Commonwealth anti-discrimination law. Most of the areas of public life listed in subclause 22(2) are supported by definitions in clause 6 of the Bill, including:

- **Work and work-related areas:** this area of public life is intended to have broad application to any work done in public life, and is supported by inclusive definitions of the following terms:
    - ‘work and work-related areas’ is defined to include employment, membership of partnerships, membership of industrial associations, the provision of services by employment agencies, and the matters relating to occupational qualifications.
    - ‘employment’ is defined to include work other than under a contract of employment, including unpaid voluntary work.
    - ‘employment agency’ is defined to include any person or body that assists people to find work or workers.
    - ‘industrial association’ is defined to have the same meaning as in section 12 of the *Fair Work Act 2009*, as follows:
      - (a) an association of employees or independent contractors, or both, or an association of employers, that is registered or recognised as such an association (however described) under a workplace law; or
      - (b) an association of employees, or independent contractors, or both (whether formed formally or informally), a purpose of which is the protection and promotion of their interests in matters concerning their employment, or their interests as independent contractors (as the case may be); or
      - (c) an association of employers a principal purpose of which is the protection and promotion of their interests in matters concerning employment and/or independent contractors;
- and includes:
- (d) a branch of such an association; and
  - (e) an organisation; and
  - (f) a branch of an organisation.

- ‘occupational authority’ is defined in conjunction with the definition of ‘occupational qualification’ to mean an authority or body that has the power to grant, continue or terminate a qualification that is necessary to practice in a profession, carry on a trade or engage in an occupation.
- **Education or training:** ‘education institution’ is defined to mean any school, college, or other institution at which education or training is provided.
- **The provision of goods, services or facilities:** ‘services’ is defined broadly to mean services of any kind, and an indicative list of services that are covered is provided.
- **Access to public places:** ‘public places’ is defined broadly to mean any place to which the public, or a section of the public, has access, whether by invitation or not.
- **Provision of accommodation:** ‘accommodation’ is defined to include both residential and business accommodation.
- **Membership and activities of clubs or member-based associations:** ‘club or member-based association’ is defined to mean an association, incorporated or otherwise, of people associated for lawful purposes that provides or maintains its facilities from the funds of the association.
- **Administration of Commonwealth laws and Territory laws, and the administration or delivery of Commonwealth programs and Territory programs:** definitions are provided of the terms ‘Commonwealth law’ and ‘Territory law’; both terms are defined to include Acts, regulations and other legislative instruments, and other legislation that applies as a consequence of a law of the Commonwealth or a Territory.

135. Subclause 22(3) provides that discrimination on the basis of certain protected attributes is only unlawful in relation to work and work-related areas. These are primarily the attributes that were previously only protected by the AHRC Act equal employment opportunity grounds.

*Previous provisions*

New provision	Old provisions
Clause 22	Divisions 2 and 3 of Part 4, ADA
	Divisions 1 and 2 of Part 2, DDA
	Sections 9, 11–15, RDA
	Divisions 1 and 2 of Part II, SDA

*Analysis*

136. Commonwealth anti-discrimination laws currently take inconsistent approaches to specifying their coverage:

- section 9 of the RDA prohibits discrimination in any area of public life.
- sections 11–15 of the RDA also prohibit discrimination in specified areas of public life.
- the ADA, DDA and SDA only prohibit discrimination in specified areas of public life.

137. The approach taken in the ADA, DDA and SDA has produced complex drafting and anomalous results. For example, volunteers are not protected by the ADA, DDA or SDA because they are not employees. It also makes it difficult for people to know when discrimination is unlawful.

138. The Bill will simplify the approach to specifying when discrimination is unlawful by prohibiting any discrimination that is connected with any area of public life. This will lead to some expansion of the coverage of anti-discrimination protections. However, there are expected to be relatively few areas of public life that are not already covered, primarily areas such as small partnerships and volunteer work. To balance any unintended consequences for the broader coverage, the Bill includes a general exception for any conduct that is justified (see clause 23 below).

## **Division 4—Exceptions to unlawful discrimination**

### **Subdivision A—Main exceptions**

#### *Overview*

139. The current Commonwealth anti-discrimination laws contain a range of specific exceptions and exemptions from prohibitions on discrimination. The exceptions and exemptions under the current Commonwealth anti-discrimination laws recognise that conduct based on a person's attributes can be justifiable and therefore distinctions made for this reason might be appropriate (for example, providing certain medical services only to members of one sex, hiring an actor with particular attributes to ensure historical accuracy or preventing people under a certain age from consuming alcohol).

140. The Bill proposes moving to a more general approach that would replace some of the current specific exceptions. However, there is no intention to change existing policy in relation to these exceptions. That is, the exceptions will remain in place but will fall within the general exceptions.

141. Some existing exceptions will be maintained to aid understanding in relation to specific issues, including the existing and well-understood exception for the inherent requirements of a job, but in a more transparent and streamlined manner. In particular, exceptions will ensure that other areas of Government policy (such as social security, migration or marriage policy) cannot be challenged under anti-discrimination law.

142. All exceptions will be the subject of a review after three years to enable consideration of whether these specific exceptions are still necessary, taking into account the operation of the new general justifiable conduct exception.

### Clause 23—Exception for justifiable conduct

#### *Analysis*

143. Clause 23 sets out a new concept for Commonwealth anti-discrimination law. This general limitations clause will allow for a more flexible, case-specific approach giving people and organisations more assistance in determining whether a practice or action was

the most appropriate method of achieving an objective. The clause will also be able to adapt to changing standards and community expectations over time.

144. Clause 23 is intended to align with the international human rights law concept of 'legitimate differential treatment'.

145. Subclause 23(2) provides that discriminatory conduct which is justifiable is not unlawful.

146. Subclause 23(3) sets out the test for determining whether the conduct of a person is justifiable. Conduct is justifiable if:

- the first person engaged in the conduct, in good faith, for the purpose of achieving a particular aim
- that aim is a legitimate aim
- the first person considered, and a reasonable person in the circumstances of the first person would have considered, that engaging in the conduct would achieve that aim, and
- the conduct is a proportionate means of achieving that aim.

147. Subclause 23(4) sets out a range of matters that must be taken into account in determining whether conduct is a proportionate means of achieving a legitimate aim. These are:

- the objects of the Bill
- the nature and extent of the discriminatory effect of the conduct
- whether the first person could instead have engaged in other conduct that would have had no, or a lesser, discriminatory effect, and
- the cost and feasibility of engaging in other conduct.

148. Although the idea of a general limitations clause is new, this builds on the defence of reasonableness in existing indirect discrimination provisions and reflects the policy rationale underpinning existing exceptions and international law. Adopting a general exception (or limitations clause) and replacing 'reasonableness' with a 'legitimate and proportionate' test were both recommendations of the SDA Report (recommendations 6 and 36).

149. This general exception for justifiable conduct would cover such situations as:

- not allowing a vision impaired person to obtain a driver's licence, and
- a swimming pool setting aside time for women only to recognise religious and cultural reasons prohibiting some females from bathing in front of men.

150. Subclause 23(6) makes it clear that the exception for justifiable conduct does not apply to discrimination on the basis of disability if a reasonable adjustment could have been made (see below).

151. Some specific exceptions from the existing Acts that have not been included because they would be justifiable under the general exception are:



- accommodation provided by charitable or non-profit organisations to people of only one sex or a particular marital status or disability (SDA paragraph 23(3)(c), DDA paragraph 25(3)(b))
- discrimination against a person on the ground of a person’s disability (which is an infectious disease) where necessary to protect public health (DDA section 48)
- discrimination against a person with disability who has an assistance animal with an infectious disease (DDA section 54A)
- educational institutions established wholly or partly for students above a particular age (ADA subsection 26(3)), and
- discrimination on the grounds of sex or marital status in the context of residential care of children (SDA section 35).

152. There is no intention to change the policy outcome in relation to any of the above exceptions.

153. There is significant overlap between special measures to achieve equality and justifiable conduct. This means beneficial measures could be characterised in either of these categories, to ensure such conduct is not unlawful.

154. Some existing specific exceptions that are no longer required because would be either justifiable or special measures to achieve equality are:

- rights granted to a woman in connection with pregnancy, childbirth or breastfeeding (SDA section 31)
- services that can be provided to only one sex (SDA section 32), and
- educational institutions established wholly or primarily for students with a particular disability (DDA subsection 22(3)).

Clause 24—Exception for inherent requirements for work

*Overview*

155. Clause 24 provides that it is not unlawful to discriminate against another person in work if the other person cannot meet the inherent requirements of a job. The inherent requirements exception does not apply to discrimination on the basis of a person’s disability if the employer could have made a reasonable adjustment for that disability that would allow the other person to carry out the inherent requirements of the job.

*Previous provisions*

<b>New provision</b>	<b>Old provisions</b>
Clause 24	Subsections 18(4) and (5), 19(3) and (4), 20(2) and (3), 21(4) and (5), 22(2) and (3), and 24(2) and (3), ADA
	Section 21A, DDA
	Section 30, SDA
	Subsection 15(1), RDA

## Analysis

156. The ‘inherent requirements’ of particular work is an existing and well-understood exception to unlawful discrimination in work in both domestic and international anti-discrimination and labour law. The Bill retains this exception—although it applies a similar test to the general justifiable discrimination exception, retaining a separate exception ensures it is specifically considered in the work context. The exception generally applies where a person is unable to carry out the essential requirements of particular work.
157. The ADA and DDA each contain an exception where a person is unable to carry out the ‘inherent requirements’ of a job because of age or disability. The SDA contains a similar exception for discrimination where sex is a genuine occupational qualification. While the exceptions are worded slightly differently, the inherent requirements and general occupational qualifications exceptions have the same effect. The RDA does not contain exceptions for inherent requirements or general occupational qualifications, although the provisions prohibiting discrimination in employment refer to work ‘for which [the] person is qualified’.
158. The term ‘inherent requirements’ is not defined under the Bill (nor was it defined in the DDA or ADA). The High Court has held that the ‘inherent requirements’ of particular employment depends on whether the requirement is ‘something essential’ to or an ‘essential element’ of the particular position. This question must be answered by reference not only to the terms of the employment contract but also by reference to the function which the employee performs as part of the employer’s undertaking and the organisation of that undertaking (*Qantas Airways Ltd v Christie* (1998) 193 CLR 280).
159. The inherent requirements exception will apply in relation to discrimination in all work and work-related activities and work relationships covered by the Bill, including:
- offering or terminating employment
  - determining or applying terms or conditions of employment (including determining who should be offered benefits or opportunities such as promotion or transfer), and
  - membership of partnerships.
160. Clause 24 contains a list of guiding factors that an employer must take into account in determining whether a person would be able to carry out the inherent requirements of the particular work (currently set out in subsection 21A(2) of the DDA and several provisions in the ADA, including subsection 18(5)). These factors include considering the person’s past training, qualifications and experience, and previous performance.
161. Clause 24 is also intended to cover the SDA test of ‘genuine occupational qualification’ and the RDA exception. Therefore, the specific examples of genuine occupational qualifications listed in section 30 of the SDA should continue to be covered by the new inherent requirements of work exception. These include:
- dramatic performances
  - attendants in male/female fitting rooms, and
  - people responsible for carrying out body searches.

162.Paragraph 24(2)(c) makes it clear that the discrimination (which includes harassment) must be necessary because the other person is unable to carry out the inherent requirements. That is, it is not permitted to harass a person because they are unable to carry out the inherent requirements of a particular job because this conduct is not necessary.

163.Subclause 24(4) makes it clear that the exception for the inherent requirements of particular work does not apply to discrimination on the basis of disability if a reasonable adjustment could have been made (see below).

Subclause 23(6), Subclause 24(4) and Clause 25—reasonable adjustments for disability

*Overview*

164.Subclauses 23(6) and 24(4) provide that in relation to discrimination on the basis of disability, the justifiable conduct and inherent requirements exceptions do not apply if the person could have made a reasonable adjustment. The meaning of ‘reasonable adjustment’ is set out in clause 25 to mean an adjustment that could have been made without causing unjustifiable hardship to the person making it.

*Previous provisions*

<b>New provision</b>	<b>Old provisions</b>
Subclauses 23(6), 24(4) and clause 25	Subsections 5(2), 6(2) and section 11, DDA

*Analysis*

165.The duty to make reasonable adjustments imposes an obligation on duty holders to take practical steps to address disadvantage experienced by someone with the protected attribute of disability. An example of a reasonable adjustment is installing audio announcements in a lift so that people with vision impairment can access a building.

166.The DDA contains an explicit duty to make reasonable adjustments. It appears in the tests for direct and indirect discrimination. It would be complex to maintain this approach in the Bill which has a single test for discrimination for all attributes. Therefore, the duty to make reasonable adjustments for disability is now part of the tests for determining whether conduct is justifiable or whether the inherent requirements exception applies.

167.If the alleged discriminatory conduct is on the basis of disability, and there is a reasonable adjustment that could have been made that means the conduct would have had no, or a lesser, discriminatory effect, then the conduct is not justifiable. Clause 25 provides that a reasonable adjustment means an adjustment that can be made without causing unjustifiable hardship. This maintains the status quo from the DDA. The factors which must be taken into account in determining whether making an adjustment would cause unjustifiable hardship are based on section 11 of the DDA. These factors are:

- the nature of any benefit or detriment likely to accrue to, or to be suffered by, any person concerned
- the effect of any disability of any person concerned

- the financial circumstances of the first person, and the estimated amount of expenditure that the first person would have to incur in order to make the adjustment
- the availability of financial and other assistance to the first person
- any relevant guidelines prepared by the Commission under section 62, and
- any relevant action plans given to the Commission under section 68.

**Subdivision B—Exceptions related to other laws, court orders etc.**

Clause 26—Exception for conduct necessary to comply with Commonwealth Acts and instruments subject to disallowance;

Clause 27—Exceptions for discrimination in accordance with certain Commonwealth migration and health laws;

Clause 28—Exception for conduct in accordance with Commonwealth laws on ground of nationality or citizenship;

Clause 29—Exception for conduct in accordance with laws that treat young people differently because of their vulnerability etc.;

Clause 30—Exception for conduct in accordance with laws prescribed by the regulations;

Clause 31—Exception for court orders, determinations and industrial instruments

*Overview*

168. The current Commonwealth anti-discrimination laws contain a number of specific exceptions and exemptions from discrimination. These exceptions and exemptions operate to limit the scope of the Acts, particularly in what type of conduct is unlawful and what is permitted.

169. As outlined above, the approach of this Bill is to ensure that certain conduct is permitted through the use of two general exceptions—justifiable conduct and inherent requirements of a job. However, some specific exceptions have also been retained to provide further certainty.

170. Subdivision B contains specific exceptions to make it clear that some public policy issues are for Parliaments, not courts, to determine. It also contains exceptions that deal with conflicting obligations that may arise under discrimination law and other laws or obligations.

*Previous provisions*

<b>New provision</b>	<b>Old provision(s)</b>
Clause 26	Section 39, ADA
	Section 47, DDA
	Section 40, SDA
Clause 27	Sections, 42, 43, ADA
	Section 52, DDA
Clause 28	New provision
Clause 29	New provision
Clause 30	Subsection 47(2), DDA
	Subsections 39(4) and (5), ADA
Clause 31	Section 39, ADA
	Section 47, DDA
	Section 40, SDA

*Analysis*

171. Clause 26 provides that if conduct is necessary to comply with Commonwealth Acts and instruments subject to disallowance then it is not unlawful discrimination. This exception would cover specific exceptions which are currently included in the Commonwealth anti-discrimination laws, including:

- allowing for differences in ages for qualifying for pensions, allowances and benefits under social security legislation (SDA section 41, DDA section 51), and
- the various laws listed in the schedules of the ADA (ADA section 39).

172. It would also cover conduct that is necessary to comply with the definition of marriage under the *Marriage Act 1961*.

173. This clause applies only to Commonwealth Acts and instruments subject to disallowance. It is not appropriate to extend the exception to instruments that are not disallowable as Parliament would not have had the opportunity to scrutinise these instruments.

174. Clause 26 refers to conduct ‘necessary to comply with’ other Commonwealth Acts and instruments. This is only intended to cover where the discrimination is required by that other Act or instrument—that is, the other law *requires* a person to take a particular course of action (for example, provide certain payments only to people with a particular disability or to people over a particular age). This language is intended to have this effect whenever it is used in the Bill.

175. Clause 27 retains specific exceptions for discriminatory conduct on the basis of age, disability, or marital or relationship status in accordance with the *Migration Act 1958* and discriminatory conduct in accordance with specified health legislation.

176. Clause 27 (and many of the other clauses in this Division) refers to conduct done ‘in accordance with’ other specified laws. This language is used in contrast to the ‘necessary to comply with’ language used in clause 26 above. It is intended to cover any conduct that is ‘in accordance with’ those Acts—that is, if the other law permits a discretion to be exercised in relation to a particular decision, it is not discrimination to take into account the specified attributes in making that decision. This language is intended to have this effect whenever it is used in the Bill.
177. The exceptions in clause 27 recognise that a person’s age, disability or marital or relationship status can be inherently relevant to a migration decision, such as whether the person is eligible for a particular visa (for example, Aged Parent or Spouse visas). Similarly, a person’s age, sex or disability can be relevant to whether they can obtain financial support for particular medical treatments or therapeutic goods (for example, some drugs are only tested, and therefore approved under the Pharmaceutical Benefits Scheme, for a subset of people who may be defined by sex and age, such as females over the age of 65).
178. Clause 28 is a new provision that provides an exception for conduct in accordance with Commonwealth laws on the ground of nationality or citizenship. As nationality or citizenship is now a protected attribute, and a number of Commonwealth laws treat citizens and non-citizens differently (such as employment in the public service or Defence Force), this exception is intended to clarify that this conduct is not unlawful discrimination.
179. Clause 29 is a new provision that provides an exception for conduct in accordance with laws that treat young people differently because of their vulnerability. Some discriminatory conduct is in accordance with (but not strictly necessary to comply with) laws which authorise differential treatment of people under a certain age. Many of these laws are currently specifically exempted by listing the Schedules of the ADA. Also, many State and Territory laws authorise differential treatment of people under a certain age, such as a minimum age for consuming alcohol or driving, or different treatment of people in the criminal justice system. Such laws recognise the lack of development or maturity of young people or are intended to provide protection for such people. This exception makes it clear beyond doubt that conduct in accordance with these types of laws is not unlawful discrimination.
180. Clause 30 is an exception for conduct in accordance with laws prescribed by the regulations. The Bill’s general approach is that where distinctions are justified, they will be covered by the justifiable conduct exception, with a range of laws relating to age also excluded by the above general provision about protecting the vulnerability of children. However, to provide for more certainty if desired, there is a general regulation-making power, such that conduct in accordance with a prescribed law is not unlawful. This permits Commonwealth, State and Territory laws to be prescribed. This is available to provide certainty in relation to the interaction between the Bill and other Commonwealth, State and Territory laws. However, due to the inclusion of specific exceptions relating to laws which distinguish on the basis of age, as well as the general justifiable conduct exception, there is no requirement for jurisdictions to undertake a time consuming exercise to identify all laws which might distinguish on the basis of an attribute.

181. This exception applies to all attributes except race or sex to maintain existing policy (neither the RDA nor the SDA includes a general power to exclude, by regulation, conduct engaged in in accordance with other laws). This general regulation-making maintains the existing policy approach in the DDA (see subsection 47(2)). The ADA provides that conduct engaged in in accordance with any State or Territory law is not unlawful, unless that law is prescribed. However, as most State and Territory laws which distinguish on the basis of age are to protect the vulnerability of children, these will be covered by the general exception in clause 29. It is therefore appropriate to align the general regulation-making power for age with the approach for disability, to enable a single approach across the Bill.

**Subdivision C—Exceptions related to religion**

Clause 32—Exception for appointment of priests, ministers etc.:

Clause 33—Exceptions for religious bodies and educational institutions

*Overview*

182. Subdivision C maintains the existing exceptions for discriminatory conduct of religious bodies and religious educational institutions, and the exceptions for specific activities such as the ordination or appointment of priests. These exceptions would also apply to the new protected attributes of gender identity, sexual orientation and religion.

183. Given the importance of freedom of religion, it is important to maintain explicit religious exemptions, particularly for matters fundamental to the practice of the religion.

184. The Bill introduces a limitation on these exceptions if the discrimination is connected with the provision of Commonwealth-funded aged care services.

*Previous provisions*

<b>New provision</b>	<b>Old provision(s)</b>
Clause 32	Paragraphs 37(a), (b) and (c), SDA
Clause 33	Section 35, ADA
	Paragraph 37(d), section 38, SDA

*Analysis*

185. Clause 32 retains the existing SDA exception for the ordination or appointment of priests, ministers of religion or members of any religious orders, or engagement of other people to perform other duties relating to religious observance. This exception applies to the new attributes of sexual orientation, gender identity and religion, in addition to the attributes previously covered by the ADA and SDA (that is, age, breastfeeding, family responsibilities, marital or relationship status, pregnancy or potential pregnancy and sex).

186. Clause 32 is a narrow exception, relating only to activities which are fundamental to the exercise of a religion. As the exception is narrow in its scope, it applies to a wider range of attributes. However, there is no scope for discrimination by a religious organisation on the basis of either race or disability, consistent with current law.

187. Clause 33 reproduces the existing ADA and SDA general exception for conduct engaged in in good faith by a body established for religious purposes, or a religious educational institution, that:

- conform to the doctrines, tenets or beliefs of that religious, or
- are necessary to avoid injury to the religious sensitivities of that religion.

188. This exception applies to the new attributes of sexual orientation, gender identity and religion, in addition to marital or relationship status, pregnancy and potential pregnancy (which were covered under the SDA).

189. Clause 33 relates to a broader range of conduct than clause 32. For that reason, it only applies to those attributes where such conduct can be justified on religious grounds. For example, while some religious orders limit who can be ordained on the grounds of age and sex, no religious order provided evidence of any broader distinctions which are made on these grounds. For those reasons, the exceptions in clause 33 do not authorise discrimination on the grounds of age or sex. This does not prohibit a religious organisation from engaging in conduct which is otherwise not unlawful because of another provision in the Act (for example, conduct that would constitute a special measure to achieve equality or justifiable conduct). For example, a religious organisation could not provide employment services only to men, but could operate a single-sex school.

190. The general exception in subclause 33(2) is limited by subclause (3), which provides that the exception does not apply to conduct connected with the provision of Commonwealth-funded aged care services. There was significant feedback during consultations of the discrimination faced by older same-sex couples in accessing aged care services run by religious organisations, particularly when seeking to be recognised as a couple. When such services are provided with Commonwealth funding, the Government does not consider that discrimination in the provision of those services is appropriate. This applies regardless of whether the Commonwealth is the sole or even dominant funder of these services (that is, this applies even if the services are provided with a combination of Commonwealth and other resources). This position is also consistent with the Government's broader aged care reforms.

191. 'Commonwealth-funded aged care' is defined in section 6 as one of three matters:

- The first is 'aged care', within the meaning of the *Aged Care Act 1997*, that is provided by an approved provider (that is, a provider approved under that Act) and in relation to which the provider has responsibilities under that Act (paragraph (a) of the definition). 'Aged care' under the *Aged Care Act* refers to residential, community or flexible care, the three primary types of care which the Commonwealth funds. The reference to 'responsibilities under that Act' utilises the concept under, for example, subsection 54-1(2) of that Act, which provides that a provider has responsibilities to a person if either:
  - the Commonwealth has paid subsidy under the *Aged Care Act* for the provision of the care to the person, or
  - the provider is approved to provide that type of care, and the person is approved to receive the care.



This ensures that any organisation which receives funding to provide aged care services generally is not able to discriminate in the provision of those services, even if Commonwealth funding is not available in relation to a specific individual.

There are two reasons why such funding might not be provided. First, if a couple enters care where one partner is in need of a high level of care, but the other partner has no such need but wishes to continue living with his or her partner. In that case, the funding will be provided for the high needs partner but not the other partner, but this provision will ensure neither partner can be discriminated against.

The second situation is that a facility may have been built to accommodate 120 people but only receives Commonwealth funding for 90 people. The operator of the facility can still be approved to provide services to 30 additional people, but without receiving funding for those people. Once again, this clause will ensure people receiving those services cannot be the subject of discrimination.

- The second component of the definition of ‘Commonwealth-funded aged care’ (paragraph (b) of the definition) is any care or service in relation to which a grant has been paid under the Aged Care Act. Chapter 5 of that Act sets out the grants that are payable as follows:
  - residential care grants (see Part 5.1)
  - community care grants (see Part 5.2)
  - flexible care grants (see Part 5.2A)
  - assessment grants (see Part 5.3)
  - accreditation grants (see Part 5.4)
  - advocacy grants (see Part 5.5)
  - community visitors grants (see Part 5.6), and
  - other grants (see Part 5.7).

Care or services provided under any of these grants, all of which are connected to the aged care system (for example, advocacy grants can be paid to ‘encourage understanding of, and knowledge about, the rights of recipients and potential recipients of aged care services’ (section 81-1 of the Aged Care Act)), can not be provided in a discriminatory manner, whether provided by a religious organisation or not.

- The final component of the definition (paragraph (c) of the definition) enables the regulations to prescribe other care or services. This provides flexibility in the system, recognising the range of aged care services which are Commonwealth-funded, including that not all programs are established under statute. Any care or service prescribed for the purpose of this paragraph must be related to the provision of aged care and must be provided with Commonwealth funding.

192. Subclause 33(3)(b) makes it clear that this limitation only applies in the context of service provision. That is, an aged-care provider can still make employment decisions which conform to the doctrines or tenets of the religion or are necessary to avoid injury to religious sensitivities of adherents of that religion. This recognises that organisations should be able to engage staff who share their values and organisational ethos.

193. The clause does not impose any new obligations on aged care providers—only those religious organisations which had previously chosen to discriminate will be affected. Equally, this simply ensures that religious providers of aged care services are in the same situation as non-religious providers of the same services, who have always been prohibited from discrimination by anti-discrimination legislation.

#### **Subdivision D—Other exceptions**

Clause 34—Exception for registered charities;

Clause 35—Exception for clubs and member-based associations;

Clause 36—Exceptions for competitive sporting activities;

Clause 37—Exception for single sex or disability educational institutions;

Clause 38—Exception for single sex accommodation for students;

Clause 39—Exceptions for insurance, superannuation and credit;

Clause 40—Exception for Defence Force and Australian Federal Police;

Clause 41—Exception for accommodation for employees;

Clause 42—Exception for junior rates;

Clause 43—Exception for employment to perform domestic duties;

Clause 44—Exception for shared accommodation

#### *Overview*

194. The remaining exceptions are included to further define the scope of certain areas of public life (sporting activities and clubs or member-based associations), or provide guidance on what constitutes ‘public’ and ‘private’ life (share-housing and domestic duties). There are also some other exceptions retained from the current Commonwealth anti-discrimination laws to provide greater guidance than is given by the justifiable conduct exception.

*Previous provisions*

<b>New provision</b>	<b>Old provision(s)</b>
Clause 34	Section 34, ADA
	Section 49, DDA
	Section 8, RDA
	Section 36, SDA
Clause 35	Section 27, DDA
	Section 25, SDA
Clause 36	Section 28, DDA
	Section 42, SDA
Clause 37	Section 22(3), DDA
	Section 21(3), SDA
Clause 38	Section 34(2), SDA
Clause 39	Section 37, ADA
	Section 46, DDA
	Sections 41, 41A, 41B SDA
Clause 40	Sections 53, 54, DDA
	Section 43, SDA
Clause 41	Section 34(1), SDA
Clause 42	Section 25, ADA
Clause 43	Section 18(3), ADA
	Section 15(3), DDA
	Section 15(5), RDA
	Section 14(3), SDA
Clause 44	Section 29(3), ADA
	Section 25(3), DDA
	Section 12(3), RDA
	Section 23(3), SDA

*Analysis*

195. Clause 34 is an exception for registered charities. The current Commonwealth anti-discrimination laws contain an exception for charitable instruments which provide charitable benefits to people of a particular group (section 34 of the ADA, section 49 of the DDA, subsection 8(2) of the RDA and section 36 of the SDA). Section 34 of the ADA, section 49 of the DDA and section 36 of the SDA provide an exception for the provision of benefits by charities.

196. The exception in clause 34 is different to the current provisions on charities, to better align the concept of ‘charitable instrument’ with the regime established by the Australian Charities and Not-for-Profits Commission Bill 2012 (ACNC Bill). This Bill refers to the definition in the ACNC Bill so that a provision of the governing rules of a registered charity is not unlawful discrimination if the provision confers charitable benefits. This policy is consistent with policy underpinning the ACNC Bill—namely, an organisation must register with the ACNC in order to receive benefits and concessions under Commonwealth law.
197. Clause 35 is an exception for clubs and member-based associations. ‘Club or member-based association’ is defined broadly in clause 6 to mean an association of people associated together for various purposes, including social, literary, cultural, political, sporting, athletic or other lawful purposes, that provides and maintains its facilities, in whole or in part, from the funds of the association. This adopts the DDA definition of a club (section 4 of the DDA).
198. The DDA and SDA contain exceptions for clubs designed for people with a particular disability (subsection 27(4) of the DDA) or a particular sex only (subsection 25(3) of the SDA) respectively. The ADA effectively permits single-age/age group clubs as it does not regulate clubs and member-based associations.
199. Restrictions on membership or other benefits by such clubs and associations to the target group would most likely constitute justifiable conduct. However, a specific exception is included to provide further guidance.
200. The policy rationale for this approach is that many attribute-based clubs and associations play a significant and meaningful role in the community which is aligned with the objects of anti-discrimination law to achieve substantive equality (ie such associations help to address historical disadvantage by promoting, advocating and protecting the interests of, and providing support to, a particular group).
201. The clause provides an exception for clubs and member-based associations, in relation to any attribute, where membership of the club or association is limited to persons with a particular attribute, or combination of attributes, and the purpose of limiting membership in this way is consistent with the objects of the Bill. The reference to the objects of the Bill is designed to ensure that clubs and associations cannot gain the benefit of this exception if doing so would defeat the objects of the Bill. For example, a ‘whites only’ racial supremacist club would not be able to use this exception as it is not consistent with the objects of the Bill.
202. To avoid any doubt, subclause 35(3) explicitly retains the exception for single-sex clubs that is currently in subsection 25(3) of the SDA.
203. Subparagraph 35(4)(a)(ii) allows clubs and associations to discriminate in restricting some access to benefits or services provided by the club or association. For example, a club may permit people that are not in the target group to join but may not permit them to hold an office within the association.
204. Clause 36 is an exception for competitive sporting activities. Subclause 36(2) provides an exception for sex and gender identity where strength, stamina or the physique of competitors is relevant, and the person is above 12 years old. Subclause 36(3) provides

an exception for age and disability in competitive sport, if the person cannot perform the actions reasonably required by the sporting activity, the sporting activity is conducted only for people of a particular age and/or disability, and that the persons who participate in the sporting activity are selected based on the skills and abilities relevant to that sporting activity.

205. The exception will restrict competitive sporting events to people who can effectively compete. The exception also ensures that specific events are not unlawful, for example disability-specific events in the Paralympics or age-specific events such as the Masters Games.
206. This provision retains the exceptions currently located in section 28 of the DDA and section 42 of the SDA (and extends the latter to also apply to gender identity).
207. Clause 38 is an exception for single sex accommodation for students based on previous section 34 of the SDA.
208. Clause 39 is an exception for insurance, superannuation and credit. This is a single streamlined exception based on the complex exceptions currently located in section 37 of the ADA, section 46 of the DDA and sections 41, 41A and 41B of the SDA. It applies to the same attributes to which the existing exceptions apply. This exception is likely to be permitted under the general justifiable conduct exception. However, it has been retained to provide certainty to industry while a body of law develops in relation to the concept of justifiable discrimination. Like all other exceptions, it will be subject to a review after three years (see below).
209. Subclause 39(5) sets out certain conditions that must be met before the exception can apply. This includes basing the discrimination on reasonable actuarial or statistical data, or, in the absence of such data, any other reasonable factors. It also requires the provider of the insurance, superannuation or credit to provide reasonable access to the data if requested to do so. This can be done by either providing a copy of the data or making it available at a reasonable time and place. This is based on paragraph 41(1)(e) of the SDA, in relation to the existing insurance exception from sex discrimination, and is now applied uniformly across all attributes and services as a streamlined provision. The specific powers for the Commission to request such data, and the offence for failing to comply with such a request (section 87 of the SDA, section 107 of the DDA and sections 52 and 54 of the ADA) have not been maintained. The Commission retains its general powers to require the production of information during a complaint (clause 107) or inquiry (clause 140).
210. Clause 40 is an exception for the Defence Force and the Australian Federal Police (AFP). This exception retains the exceptions currently located in sections 53 and 54 of the DDA and section 43 of the SDA. It is not unlawful to discriminate on the basis of disability in connection with employment, engagement or appointment:
- in the Defence Force in a position involving combat duties or combat-related duties
  - in the Defence Force involving peacekeeping services, or
  - in the AFP as part of a peacekeeping force.

211. Subclause 40(3) means that it is not unlawful sex discrimination to refuse to employ, engage or appoint a woman in the Defence Force in a position involving combat duties or combat-related duties. This exception will cease to have effect on 1 September 2016 as the Government has announced a staged process to open all combat duty categories to women over five years (from September 2011). This provision maintains the existing exception from section 43 of the SDA until that process is complete.
212. Clause 41 is an exception for accommodation for employees. Based on subsection 34(1) of the SDA, it applies in relation to family responsibilities, marital or relationship status and sex, and allows employees to provide different standards of accommodation where it is not reasonable to expect the employer to provide accommodation of the same standard for all employees. For example, a mining company with a large number of male employees may provide bunk bed dormitory accommodation for them but provide a single room for female employees.
213. Clause 42 is an exception for junior rates based on section 25 of the ADA which provides an exception in relation to youth wages. This allows employers to pay junior rates (defined in section 6 as remuneration payable in accordance with minimum wage entitlements under a Commonwealth, State or Territory law) and to make decisions about who should be offered employment, taking junior rates into account.
214. Clause 43 is an exception for performing domestic duties on premises where the employer resides. This retains the exception currently located in subsection 18(3) of the ADA, subsection 15(3) of the DDA, subsection 14(3) of the SDA and subsection 15(5) of the RDA. Its purpose is to clarify that engaging a person to perform domestic duties in an employer's residence falls within the private sphere and is not regulated by the Bill.
215. Clause 44 is an exception for share-housing where the provider or a near relative is resident. This retains the exception currently located in subsection 29(3) of the ADA, paragraph 25(3)(a) of the DDA, subsection 12(3) of the RDA and paragraph 23(3)(a) of the SDA. The exception has been streamlined to make it clearer that it does not apply if accommodation is regularly provided on the premises for more than three people, or if the provider intends to provide accommodation for more than three people.
216. Clause 45 applies generally to all exceptions in the Division. It clarifies that the exceptions (other than justifiable conduct) do not apply to discrimination because of the extended meaning of 'attributes' in subclause 19(4) (that is, because of the attributes of an associate, past, present or future attributes or assumed attributes). For example, if a religious organisation does not hire homosexual staff to conform with its doctrines, it cannot rely on this exception to refuse to hire a person who it mistakenly assumed was homosexual.
217. However, given the general nature of the justifiable conduct exception, it is important that this exception permits consideration of the extended meaning of the attributes. For example, if it is justifiable to allow a swimming pool to operate for a short period for women only, then it is equally justifiable to both refuse to admit a man and refuse to admit a woman who insists on being accompanied by a man.
218. Clause 46 provides that the exceptions (in particular, the justifiable conduct exception) is not limited by any of the other exceptions. That is, because the justifiable conduct

exception applies generally, there is potential overlap with other specific exceptions but this is not intended to limit what could be covered by the general justifiable exception.

219. Clause 47 provides that the Minister must arrange for a review of the exceptions in this subdivision to be conducted within three years of commencement of the Bill to enable consideration of whether these exceptions are necessary, taking into account the operation of the new justifiable conduct exception.

## **Part 2-3—Other unlawful conduct**

### **Division 1—Guide to this Part**

#### Clause 48—Guide to this Part

220. Clause 48 provides a guide to Part 2-3 of the Bill.

221. This Part includes the forms of conduct other than discrimination which are unlawful under the Bill.

### **Division 2—Sexual harassment**

#### Clause 49—when a person *sexually harasses* another person

##### *Overview*

222. Clause 49 defines sexual harassment.

223. A person sexually harasses another person:

- if they make:
  - an unwelcome sexual advance
  - an unwelcome request for sexual favours, or
  - engage in other unwelcome conduct of a sexual nature, and
- a reasonable person would have anticipated the possibility that the target of this behaviour would be offended, insulted, humiliated or intimidated by the conduct.

##### *Previous provisions*

<b>New provision</b>	<b>Old provision</b>
Clause 49	Section 28A, SDA

##### *Analysis*

224. The definition of sexual harassment in clause 49 preserves the policy of section 28A of the SDA.

## Clause 50—when sexual harassment is unlawful

### *Overview*

225. Clause 50 provides that sexual harassment is unlawful where it is connected with any area of public life. The concept of being ‘connected with’ an area of public life is defined in clause 7 of the Bill to broadly include any conduct engaged in in the course of, for the purpose of, or in relation to, an area of public life. Under clause 50, sexual harassment need not actually occur in a public place provided that there is a clear connection to an area of public life.

226. For example, if an office Christmas party were held in the CEO’s private home, sexual harassment that occurred at that party would be connected to public life because it occurred in the course of a work function that was directly related to an employment relationship.

227. Similarly, if sexual harassment occurred in dormitories provided by the employer to its employees at the work site, the conduct may be sufficiently connected to public life because of the relationship to the people residing on the premises and the employment relationship.

### *Previous provisions*

<b>New provision</b>	<b>Old provision(s)</b>
Clause 50	Sections 28B–28L, SDA.

### *Analysis*

228. Under the SDA, sexual harassment is only unlawful in relation to specific activities and relationships within specified areas of public life. This is complex and has led to difficulties in assessing when such conduct is unlawful.

229. Under this Bill, sexual harassment would be unlawful in any area of public life. While this will result in a broadening of the coverage of the prohibition on sexual harassment, this is consistent with the coverage of discrimination, and implements recommendation 8 of the SDA Report. It also recognises that there is no public interaction in which sexual harassment is acceptable. This general approach has operated in Queensland since 1991 (section 118 of the *Anti-Discrimination Act 1991* (Qld) simply provides that ‘a person must not sexually harass another person’) without any unintended consequences.

## **Division 3—Racial vilification**

### Clause 51—Racial vilification is unlawful

#### *Overview*

230. Clause 51 prohibits racial vilification subject to exceptions intended to preserve artistic performances, genuine academic, artistic or scientific debate, and fair reporting of matters in the public interest.



231. Racial vilification occurs where:

- a person engages in conduct
- that conduct is reasonably likely to offend, insult, humiliate or intimidate another person or persons
- the conduct is engaged in because the person, an associate of the person, is of a particular race, and
- the conduct is engaged in otherwise than in private.

232. Race need only be one of the reasons that the conduct was engaged in, and does not need to be the dominant reason (see clause 8).

233. Exceptions apply to anything done or said, reasonably and in good faith, in:

- artistic performances
- genuine academic, artistic or scientific debates, or for other genuine purposes, and
- in making a fair or accurate report on a matter of public interest, or
- in making a fair comment on a matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.

234. This clause replicates without change sections 18C and 18D of the RDA.

*Previous provisions*

<b>New provision</b>	<b>Old provision</b>
Clause 51	Sections 18C and 18D, RDA.

**Division 4—Requesting or requiring information for a discriminatory purpose**

Clause 52—Requesting or requiring information for discriminatory purpose

*Overview*

235. Clause 52 provides that it is unlawful to request information for the purpose of unlawfully discriminating, or deciding whether to unlawfully discriminate, against the person that provides the information.

236. Unlawful discrimination need only be one purpose for the request for information, and does not need to be the dominant purpose (see clause 8).

*Previous provisions*

<b>New provision</b>	<b>Old provision</b>
Clause 52	Section 32, ADA
	Section 30, DDA
	Section 27, SDA

## *Analysis*

237. The existing provisions of the ADA, DDA, and SDA require proof that information would not have been requested of people without the protected attribute in circumstances that were the same or not materially different. This requires a comparison between the questions that would have been asked of people with the attribute and those without. In practical terms, this would have frequently been very difficult to establish.
238. Clause 52 simplifies the test by removing the comparator element. Clause 52 now requires that the person requesting the information requested it for the purpose of discriminating or deciding whether to discriminate. For example, an employer cannot ask an employee their age, if the purpose for doing so is determining whether or not they are close to retirement before determining whether the employee should be eligible for a training opportunity. However, an employer could ask an employee their age if the purpose is to collect statistical information about the composition of their workforce.
239. The shifting burden of proof in subclause 124(1) applies to this provision. This means that in considering a complaint alleging a discriminatory request for information, the complainant would need to establish they were asked for information and would need to lead evidence from which it could be concluded that the information sought was for a discriminatory purpose, or for the person requesting the information to decide whether to engage in discriminatory conduct (eg whether or not to hire a person because of their attribute). The burden would then shift to the respondent to explain the legitimate reason for requesting the information, including if the purpose to which it would be put would not be unlawful because it was justifiable or was otherwise covered by an exception under the Act.

## **Division 5—Publishing etc. material indicating intention to engage in unlawful conduct**

### Clause 53—Publishing etc. material indicating intention to engage in unlawful conduct

#### *Overview*

240. Clause 53 provides that it is unlawful for a person to publish or display material if it indicates, or could be reasonably understood as indicating, that the person intends to engage in unlawful conduct.
241. For example, advertisements indicating that only men will be accepted for a particular position, or that Indigenous people will be eligible for a reduced rate of pay, would both indicate an intention to engage in unlawful conduct and would themselves be unlawful.
242. An exception provides that it is not unlawful:
- to publish or display material for the purpose of discouraging unlawful conduct, or
  - to publish fair or accurate reports, or to make a fair comment on a matter of public interest.

### *Previous provisions*

<b>New provision</b>	<b>Old provision</b>
Clause 53	Section 50, ADA
	Section 44, DDA
	Section 16, RDA
	Section 86, SDA

### *Analysis*

243. Discriminatory advertising is unlawful under each of the Commonwealth anti-discrimination laws, and is a criminal offence under the ADA, DDA and SDA.
244. Criminal liability for discriminatory advertising has been removed from clause 53 and replaced with civil liability, which will enable enforcement through complaints to the Commission while removing the complexity associated with simultaneous civil and criminal liability.
245. In addition, new exceptions have been provided for publishing material that is intended to discourage unlawful conduct, or for fair or accurate reporting of, or fair comment on, matters of public interest. The former exception is to ensure unintended liability is not imposed on people who in seeking to discourage unlawful conduct, reveal a person's intention to undertake that conduct. The latter exception mirrors the exception to racial vilification in paragraph 51(4)(c), and is intended to ensure that unintended liability is not imposed on news organisations fairly reporting or commenting on events such as racist rallies.

## **Division 6—Victimisation**

### Clause 54—Victimisation of person for making a complaint etc.

#### *Overview*

246. Clause 54 defines victimisation and details when victimisation is unlawful. In general terms, victimisation is unlawful where a person is untreated unfavourably because of:
- the person asserting a right under the Bill or taking action against an alleged discriminator, and related matters
  - the person proposing to assert a right or take action
  - an associate of the person, or another person on that person's behalf, asserting a right or taking an action, or
  - the alleged discriminator believing that this is the case.
247. The prohibited reasons above need only be one reason for the unfavourable treatment, and do not need to be the dominant reason (see clause 8).

248. Subclause 54(2) provides an exception where the original complaint, or asserting the right, was not done in good faith. The exception does not apply where a person is merely proposing, or is believed to be proposing, to do any of the actions listed in paragraph 54(1)(a) relating to a complaint. This exception appears in the SDA (subsection 94(3)) and the AHRC Act (subsection 26(3)).

*Previous provisions*

<b>New provision</b>	<b>Old provision</b>
Clause 54	Section 51, ADA
	Section 42, DDA
	Subsection 27(2), RDA
	Section 94, SDA
	Subsection 26(2), AHRC

*Analysis*

249. Victimization of complainants is a criminal offence under each of the existing Commonwealth anti-discrimination laws. It is possible to bring a civil complaint about victimisation through the Commission.

250. Criminal liability for victimisation has been removed from clause 54 and replaced with civil liability, which will enable enforcement through complaints to the Commission while removing the complexity associated with simultaneous civil and criminal liability.

251. Subclause 54(2) ensures that protection from victimisation does not extend to situations where a person has made a false allegation or complaint, or seeks to use the AHRC Act other than for legitimate purposes.

**Part 2-4—Extensions of liability for unlawful conduct**

**Division 1—Guide to this Part**

Clause 55—Guide to this Part

252. Clause 55 provides a guide to Part 2-4 of the Bill.

**Division 2—Extensions of liability for unlawful conduct**

Clause 56—Causing etc. unlawful conduct

*Overview*

253. Clause 56 provides that a person who causes, instructs, induces, aids or permits another person to engage in unlawful conduct is taken also to have engaged in that conduct.

254. For example, it would be unlawful for a human resources manager to issue an instruction to recruitment panels that women who are pregnant should not be selected. Refusing to select a pregnant woman for a position she is fully able to perform would be unfavourable treatment based on her pregnancy and therefore unlawful. Although the human resources manager may not have committed the discrimination themselves, they will have instructed that it occur and will be equally liable.

*Previous provisions*

<b>New provision</b>	<b>Old provision</b>
Clause 56	Section 56, ADA
	Section 122, DDA
	Section 17, RDA
	Section 105, SDA

*Analysis*

255. This provision does not alter the policy of existing provisions of Commonwealth anti-discrimination law.

Clause 57—Liability for unlawful conduct of directors, officers, employees or agents etc.

*Overview*

256. Subclauses 57(1) and (2) provide that companies, employers and principals are liable for the conduct of their directors, employees and agents that is connected with their duties or employment.

257. The concept of being ‘connected with’ an area of public life is defined in clause 7 of the Bill to broadly include any conduct engaged in in the course of, for the purpose of, or in relation to, an area of public life.

258. For example, a company will be liable for sexual harassment of a company employee by a director that occurred in connection with their duties.

259. However, an exception is provided by subclause 57(3) where the principal took reasonable precautions and exercised due diligence to avoid the conduct.

260. For example, it may be reasonable and demonstrate due diligence to make and enforce workplace policies prohibiting unlawful conduct and regularly train staff on their responsibilities.

*Previous provisions*

<b>New provision</b>	<b>Old provision</b>
Clause 57	Section 57, ADA
	Section 123, DDA
	Sections 18A and 18E, RDA
	Section 106, SDA

## *Analysis*

261. Existing provisions of Commonwealth anti-discrimination law on vicarious liability are inconsistently drafted.

- The RDA and SDA provide that the employee or agent's act must have taken place in connection with their employment as an employee or their duties as an agent, and provide an exception where a person took 'all reasonable steps' to prevent their employees or agents from acting unlawfully.
- The ADA and DDA require that the director, employee or agent of a company, employer or principal act within their actual or apparent authority, and provide an exception whether the company, employer or principal took reasonable precautions and exercised due diligence.

262. Clause 57 reconciles these approaches by using the connection test for imposition of liability, and the reasonable precautions and due diligence to exempt persons from liability. This approach is intended to balance incentives for businesses to take reasonable measures to avoid unlawful behaviour by directors, employees and agents with reasonable recourse for persons who have suffered discrimination.

## Clause 58—Liability of partnerships, unincorporated associations and trusts for unlawful conduct

### *Overview*

263. Clause 58 provides for liability of partnerships, unincorporated associations and trusts under the Bill.

264. Subclauses 58(1)–(3) provide that the provisions of the Bill apply to partnerships, unincorporated associations and trusts as though they were persons, and the partners, members of the committee of management, or trustee were their agents.

265. Subclause 58(4) provides that any liability under the Bill is a liability of each of the partners, members of the committee of management, or trustees, but may be discharged by any of them.

266. Subclause 58(5) provides that partners, members of a committee of management, or trustees will not be liable because of subclause 58(4) where they took reasonable precautions and exercised due diligence to avoid the conduct. This is consistent with the approach adopted in subclause 58(3) in relation to companies, employers and principals.

### *Previous provisions*

267. Clause 58 is a new provision. Similar concepts were previously built into the relevant concepts of when discrimination was unlawful (see, for example, when discrimination is unlawful in relation to partnerships (eg section 18, DDA) and membership of clubs (eg section 27, DDA)).

## *Analysis*

268. Clause 58 is intended to clarify the rules for liability attaching to these three forms of legal relationship. It also incorporates the rule currently provided for in paragraph 3(3)(b) of the AHRC Act.

### **Part 2-5—Equality before the law**

#### **Division 1—Guide to this Part**

##### Clause 59—Guide to this Part

269. Clause 59 provides a guide to Part 2-5 of the Bill.

#### **Division 2—Equality before the law for people of all races**

##### Clause 60—Equality before the law for people of all races

###### *Overview*

270. Clause 60 provides for equality before the law for people of all races.

271. Subclause 60(1) provides that if, under a law, people of a particular race do not enjoy a right enjoyed by people of another race, or enjoy the right to a more limited extent, then by force of clause 60 they have that right to the same extent as persons of another race.

272. Subclause 60(2) provides that subclause 60(1) does not apply to a law that is a special measure to achieve equality (see clause 19).

273. Subclause 60(3) clarifies that subclause 60(1) applies to laws relating to the management of Aboriginal or Torres Strait Islander land. The note under the clause clarifies that such laws are not special measures, maintaining the policy effect of subsections 8(1) and 10(3) of the RDA.

###### *Previous provisions*

<b>New provision</b>	<b>Old provision</b>
Clause 60	Section 10, RDA

## *Analysis*

274. Clause 60 relies on the definition of ‘race’ in this Bill which include colour, descent, national or ethnic origin.

275. Subclause 60(1) clarifies that a right in this context means a human right or some other right. This Bill defines ‘human rights’ as the rights and freedoms recognised or declared by the human rights instruments (see subclause 3(2)).

276. With these clarifications, clause 60 will have the same effect as section 10 of the RDA. This clause will operate to modify Commonwealth, State and Territory laws which deny or limit the rights of people of a particular race, to ensure that laws are applied equally to all people.



## Chapter 3—Measures to assist compliance

### Part 3-1—Measures to assist compliance

#### Division 1—Guide to this Part

277. Clause 61 provides a guide to Part 3-1 of the Bill.

278. This Part contains a number of voluntary measures which are available to give business and other organisations greater understanding of their obligations under the Bill.

#### Division 2—Guidelines to assist compliance

Clauses 62— Commission may prepare guidelines;

Clauses 63— Effect of guidelines

##### *Overview*

279. Clause 62 provides that the Commission may prepare written guidelines to assist people to avoid engaging in unlawful conduct or Commonwealth conduct that is contrary to human rights. The clause also provides that the Commission can vary or revoke guidelines and publish guidelines, and that guidelines are not legislative instruments.

280. Clause 63 provides that the guidelines are not binding, and do not give rise to any right, defence, expectation, duty or obligation; and that a Court or the Commission when dealing with complaints under this Bill may take into consideration a person's compliance with the guidelines.

##### *Previous provisions*

<b>New provision</b>	<b>Old provisions</b>
Clause 62	Subsection 53(1)(f), ADA
	Subsection 67(1)(k), DDA
	Subsection 20(d), RDA
	Subsection 48(1)(ga), SDA
	Subsections 11(1)(n), 31(h), AHRC Act
Clause 63	New provision

##### *Analysis*

281. The policy rationale for the Commission preparing guidelines has been maintained. Guidelines provide greater guidance to organisations on what is and is not unlawful conduct. The guidelines are prepared to assist all users of this Bill to understand their rights and obligations, and therefore increase compliance.

282. Subclause 62(3) has been included to assist readers, as guidelines are not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*.

283. Clause 63 outlines that the guidelines are not binding, but that the Commission or the court in dealing with a complaint may have regard to a person's compliance with the guidelines, if they consider it appropriate to do so. Compliance with any guidelines should not be a complete defence to a complaint of unlawful conduct, but may be evidence of compliance.

### **Division 3—Review of policies etc. for compliance**

Clause 64—Commission may review policies or programs for compliance;

Clause 65—Review reports not to be published;

Clause 66—Effect of review reports

#### *Overview*

284. Clause 64 provides that the Commission, on application from a person or body, may review whether their policies, programs or facilities may constitute unlawful conduct or Commonwealth conduct that is contrary to human rights. The Commission may decline to conduct the review. If the Commission conducts the review, it must provide the person or body that applied for the review with a written report on the outcomes of the review.

285. Clause 65 provides that review reports are not to be published unless the person or body that applied for the review consents to the publication.

286. Clause 66 provides that a review report is not binding, but that a Court or the Commission dealing with proceedings under this Bill may have regard to a review report if they consider it appropriate to do so.

#### *Previous provisions*

287. These are new provisions.

#### *Analysis*

288. The Commission has not previously had the power to conduct reviews or audits of policies, programs or facilities of persons or bodies. This review mechanism is voluntary and is intended to provide greater guidance to organisations who seek it, and to encourage proactive steps to comply with the Bill. The Commission will only be able to conduct a review of this nature if a person or body requests it to do so.

289. Persons and organisations will be able to request a review of existing and proposed policies, programs, practices or facilities. Compliance with any Commission recommendations from a review may be evidence of compliance with the Bill, but will not operate as a complete defence. The review mechanism will assist organisations to

understand and meet their legal obligations under this Bill, and to prevent discrimination from occurring.

290. The Commission may charge the person or body that made the application a fee for dealing with the application under clause 207, which will enable the Commission to recover its costs.

291. Clause 64(4) is included to assist readers, as a review report is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*.

## **Division 4—Action plans**

### *Overview*

Clause 67—Development etc. of action plans:

Clause 68—Action plans may be given to the Commission:

Clause 69—Effect of action plans

292. Clause 67 provides for the development and amendment of action plans to assist persons or bodies to avoid engaging in unlawful conduct.

293. Clause 68 provides that action plans and amendments may be given to the Commission, and that the Commission must publish action plans and amendments given to it.

294. Clause 69 provides that action plans are not binding, and that a court or the Commission dealing with proceedings under this Bill may have regard to an action plan if they consider it appropriate to do so.

### *Previous provisions*

<b>New provision</b>	<b>Old provisions</b>
Division 4	Part 3, DDA (but for disability discrimination only)

### *Analysis*

295. The ability to develop action plans has been expanded to cover all protected attributes.

296. Clause 67 permits, but does not require, the development of voluntary action plans. Action plans are voluntary and are intended to provide greater guidance to organisations and encourage proactive steps to comply with the Bill. Compliance with a voluntary action plan will not be a complete defence to a complaint of unlawful conduct, but may be evidence of compliance.

297. Clause 67(5) is included to assist readers, as an action plan is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*.

298. Clause 69, which provides that action plans do not give rise to liability, does not affect the ability of an employer to require employees to comply with an action plan.

## **Division 5—Disability standards**

Clause 70—Meaning of disability standard;

Clause 71—Process for making etc. disability standards;

Clause 72—Effect of disability standards: conduct in accordance with standard is not unlawful discrimination;

Clause 73—Effect of disability standards: unlawful to contravene standard;

Clauses 74—Exceptions and exemptions do not apply to disability standards

### *Overview*

299. Clause 70 defines ‘disability standard’ as an instrument made by the Minister to specify requirements to be complied with in relation to disability and one or more areas of public life. Subclause 70(3) provides that a disability standard may provide for exceptions or for the Commission to grant exemptions from requirements specified in the standard.

300. Subclause 70(4) provides that a disability standard must provide for the standard to be reviewed every five years.

301. Clause 71 provides the process for the Minister to determine disability standards, including requirements to consult with relevant State and Territory ministers. This is in addition to the general requirements of the *Legislative Instruments Act 2003* to consult broadly with all interested parties before making a legislative instrument.

302. Clause 72 provides that conduct in accordance with a disability standard is not unlawful discrimination on the ground of a disability that is covered by that standard.

303. Clause 73 provides that it is unlawful to contravene a requirement of a disability standard.

304. Clause 74 provides that the exceptions and exemptions provisions of Chapter 2 and Division 8 of Part 3-1 do not apply in relation to disability standards, other than as provided in a standard.

### *Previous provisions*

<b>New provision</b>	<b>Old provisions</b>
Division 5	Division 2A of Part 2, DDA

### *Analysis*

305. Division 5 provides the power to develop binding standards for disability only; there is no change from the current policy.

306. Binding standards are particularly necessary in the area of disability, but can be resource and time intensive to create. Other compliance mechanisms that will now be available

such as compliance codes may be more appropriate mechanisms for achieving greater certainty of obligations.

307. Subclause 71(6) provides that the *Legislative Instruments Act 2003* applies in relation to a disability standard (or an amendment of a disability standard) subject to the following:

- a disability standard does not commence until after the disallowance period, and
- a disability standard is exempt from sunseting.

308. Under subclause 71(6) the sunseting provisions of Part 6 the *Legislative Instruments Act 2003* will not apply in relation to a disability standard—this is due to the fact that a legislative instrument will usually sunset after a 10 year period, but the period specified for a disability standard is likely to be longer than that (there is no limit on the period that may be specified). This provides certainty of obligations, particularly given the potential long life of standards (eg the Transport Standards deal with buses, trains, etc).

## **Division 6—Compliance codes**

Clause 75—Meaning of compliance code;

Clause 76—Process for making etc. compliance codes;

Clause 77—Duration of compliance code;

Clause 78—Effect of compliance codes

### *Overview*

309. Clause 75 defines compliance code as a code that includes provisions of either or both of the following kinds:

- that if specified persons or bodies engage in specified conduct, that conduct is taken, for the purpose of this Bill, not to be unlawful conduct of one or more specified kinds, and
- that if specified persons take specified steps or measures, those steps or measures are taken, for the purpose of this Bill, to constitute taking reasonable precautions and exercising due diligence to avoid other persons engaging in unlawful conduct.

310. Clause 76 provides that the Commission may make, amend or revoke compliance codes, only if it is satisfied it complies with clause 75 and is consistent with the objects of the Act.

311. Clause 77 provides for the duration of compliance codes. If a code operates for longer than five years, it must be subject to a review every five years.

312. Clause 78 details the effect of compliance codes.

### *Previous provisions*

313. These are new provisions.

## *Analysis*

314. The Commission will have a new power to make, amend or revoke compliance codes. It is not intended that such a power be mandatory, but that it be an option for industries that may wish to obtain greater certainty about their obligations. If made, compliance with a code would be a complete defence against discrimination.
315. In its 2004 review of the DDA, the Productivity Commission recommended the inclusion of such an approach:
- The Productivity Commission considers that the benefits of co-regulation, particularly its flexibility to deal with a variety of different circumstances and changes over time, are compelling. The Commission is not suggesting that it be mandatory for industry organisations to formulate and implement codes of conduct, just that this form of regulation be an option... Codes of conduct should be certified only after organisations have consulted with stakeholders, including people with disabilities and relevant government departments and agencies.
316. It is also intended that this power could be used to certify other regulatory schemes as being consistent with the Act, with the effect that compliance with those schemes does not constitute unlawful conduct under this Bill. For example, the Commission could certify that a particular standard made by Standards Australia complies with the Act. The Commission could also use this power to develop and certify its own code of general application (for example, a Small Business Code) to provide certainty about what actions will not constitute discrimination or will not give rise to an action.
317. Compliance codes are intended to cover all kinds of unlawful conduct. Failure to comply with a compliance code will not itself be unlawful.
318. Compliance codes, if made by the Commission, will be legislative instruments and the Commission will be required to comply with the consultation requirements of Part 3 of the *Legislative Instruments Act 2003*. It is intended that appropriate consultation will be conducted with Government, industry and community, which may in itself be a means of encouraging compliance.
319. Under subclause 76(7) the sunset provisions of Part 6 the *Legislative Instruments Act 2003* will not apply in relation to a compliance code—this is due to the fact that a legislative instrument will usually sunset after a 10 year period, but the period specified for a compliance code could be longer than that (there is no limit on the period that may be specified). Subclause 75(5) provides a mandatory review mechanism for a compliance code with a specified period more than five years, and provides for the code to be reviewed at least once in every five year period while the code has effect.
320. The Commission may charge the person or body that made the application a fee for dealing with the application under clause 209, which will enable the Commission to recover costs. The Commission does not have to impose a fee—for example, the Government might choose to fund the Commission to develop a code of general application across the business sector (such as a Small Business Code), rather than requiring any particular organisation or body to bear those costs on behalf of all small businesses.

## **Division 7—Special measure determinations**

Clauses 79—Meaning of special measure determination;

Clause 80—Process for making etc. special measure determinations;

Clause 81—Duration of special measure determinations;

Clause 82—Effect of special measure determinations

### *Overview*

321. Clause 79 defines special measure determinations as a determination, made by the Commission, that a policy of program made, developed or adopted (or proposed), or other conduct engaged in (or proposed), by a person or body is a special measure to achieve equality.

322. Clause 80 provides for the process of making special measure determinations.

323. Clause 81 provides for the duration of special measure determinations, which cannot exceed five years. However, this does not prevent an application for a further determination once five years expires—it simply ensures regular consideration of whether the special measure is still necessary.

324. Clause 82 provides that while a special measure determination has effect, the relevant measure is taken to be a special measure to achieve equality for people who have the attribute(s) specified in the determination.

### *Previous provisions*

325. These are new provisions.

### *Analysis*

326. Division 7 provides the Commission with the power to certify that certain conduct is a special measure to achieve equality. Under the current Commonwealth anti-discrimination regime, organisations occasionally seek a temporary exemption for special measures from the Commission. However, the Commission usually does not grant a temporary exemption as it is unnecessary—special measures are not discrimination as they are positive measures to achieve equality, so a temporary exemption is not required.

327. An example of a temporary exemption that has been sought from the Commission which might more appropriately be considered for a special measure determination under this Bill relates to a business seeking an exemption to pay its female employees a slightly higher superannuation percentage than male employees to take into account the time a female employee is likely to be out of the workforce following childbirth and its associated responsibilities.

328. The power for the Commission to certify that certain conduct is a special measure is intended to provide certainty to organisations that are implementing special measures, and to encourage the taking of special measures to achieve equality. Certification would

not be required for conduct to be a special measure. The Commission will be able to recover costs associated with the certification process.

329. Under clause 79, the Commission may not determine that a Commonwealth, State or Territory law is a special measure. Whether laws are special measures is a matter for individual Parliaments, and ultimately the courts, to determine.

**Division 8—Temporary exemptions**

Clauses 83—Meaning of temporary exemption

Clause 84—Process for granting etc. temporary exemptions

Clause 85—Duration of temporary exemptions

Clause 86—Effect of temporary exemptions

*Overview*

330. Clause 83 defines temporary exemption as an exemption granted by the Commission that exempts particular conduct of a person or body from being unlawful discrimination.

331. Clause 84 provides that the Commission may grant exemptions from particular conduct being unlawful discrimination.

332. Clause 85 provides that a temporary exemption ceases to have effect at the end of the period specified in the exemption, which cannot exceed five years.

333. Clause 86 provides that while a temporary exemption has effect, a person or body covered by that exemption and engaging in conduct covered by that exemption is taken to not be unlawful discrimination.

*Previous provisions*

<b>New provision</b>	<b>Old provision</b>
Division 8	Division 5 of Part 4, ADA
	Sections 55–58, DDA
	Sections 44–47, SDA

*Analysis*

334. Under this Division, the Commission can issue temporary exemptions while organisations take steps to improve compliance with the Bill. Temporary exemptions will be available in relation to all attributes.

335. Temporary exemptions were previously not available under the RDA. Under this Division, the Commission will be able to grant temporary exemptions for race, to ensure consistency across the Bill. As the Commission uses the power to grant temporary exemptions to provide protection for organisations while they transition towards full compliance with Commonwealth anti-discrimination law, rather than to permit discriminatory conduct, there is little scope for such an exemption in practice.



336. A temporary exemption granted by the Commission will now be a legislative instrument instead of an administrative instrument, which means that the exemptions will be subject to legislative scrutiny. Additionally, there will no longer be Administrative Appeals Tribunal (AAT) review, which will ensure that only the Commission can issue a temporary exemption which guarantees integrity in the regime. This is balanced by the fact that Parliament is able to disallow the instrument.

## Chapter 4—Complaints

### Part 4-1—Making a complaint to the Commission

#### Division 1—Guide to this Part

##### Clause 87—Guide to this Part

337. Clause 87 provides a guide to Part 4-1 of the Bill.

#### Division 2—The conduct that may be the subject of a complaint

##### Clause 88—The conduct that may be the subject of a complaint

###### *Overview*

338. Clause 88 provides for the categories of conduct that may be the subject of a complaint.

###### *Previous provisions*

<b>New provision</b>	<b>Old provisions</b>
Clause 88	Subsections 11(1)(f), 20(1), 31(b), 32(1), 46P(1), AHRC Act.

###### *Analysis*

339. Clause 88 ensures all complaints that may be made under the Bill are dealt with under a single streamlined process. This covers the following complaints:

- complaints of unlawful conduct
  - unlawful discrimination
  - sexual harassment
  - racial vilification
  - discriminatory requests for information
  - discriminatory advertising, and
  - victimisation, and
- complaints of alleged conduct by the Commonwealth that is contrary to human rights.

340. This clause provides that the functions and powers under Chapter 4 are to be performed or exercised on behalf of the Commission by the President. This provides functional separation between the President, who has responsibility for dispute resolution, and the other members of the Commission who have significant advocacy functions.

341. Complaints cannot be made in relation to Commonwealth conduct that is contrary to rights or freedoms that only fall within the International Covenant of Economic, Social and Cultural Rights (subclause 88(2)).

342. Under this Bill, the separate ‘equal opportunity in employment’ complaints stream in Part II – Division 4 of the AHRC Act has not been retained. The stream covered discrimination in work on the grounds of industrial activity, religion, political opinion, social origin, nationality, medical record and criminal record. While complaints could be made on these grounds, the Commission could only endeavour, where appropriate, to effect a settlement. If settlement could not be achieved and the Commission was of the view that the conduct constituted discrimination, the Commission was to report to the Minister. However, the recommendations in the report were not enforceable.

343. Under this Bill, discrimination in work and work-related areas on the grounds of industrial history, religion, political opinion, social origin, nationality/citizenship and medical record is unlawful. Complaints on these grounds will be made under this clause as in other forms of discrimination and unlawful conduct.

### **Division 3—Making etc. a complaint**

#### *Subdivision A—Who may make a complaint*

#### Clause 89—Who may make a complaint

##### *Overview*

344. Clause 89 sets out who may make a complaint to the Commission. In all matters there must be one or more persons who have been aggrieved by the conduct before a complaint can be lodged with the Commission.

##### *Previous provisions*

<b>New provision</b>	<b>Old provisions</b>
Clause 89	Subsections 46P(2)–(3), AHRC Act

##### *Analysis*

345. Clause 89 preserves existing policy of who can make a complaint to the Commission.

346. This clause defines the following terms for the purposes of Chapter 4:

- Complainant—a person or industrial association that makes a complaint.
- Respondent—a person who is alleged in a complaint to have engaged in the conduct to which the complaint relates.
- Affected party—a person on whose behalf a complaint is made is an affected party in relation to the complaint (including a complainant who makes a complaint on his or her own behalf).
- Representative complaint—a complaint that is made on behalf of at least one person who is not a complainant (eg class actions).

## Clause 90—Person must not make a complaint if another complaint has already been made

### *Overview*

347. Clause 90 prohibits a complaint from being made if another complaint has been made in relation to the same or substantially the same conduct and it did not fail for want of jurisdiction. However, subclause 90(2) provides the Commission with discretion to permit a person to make such a complaint if it is satisfied that there are exceptional circumstances to do so.

### *Previous provisions*

<b>New provision</b>	<b>Old provisions</b>
Clause 90	Subsection 12(4), ADA
	Subsection 13(4), DDA
	Subsection 6A(2), RDA
	Subsection 10(4) and 11(4), SDA

### *Analysis*

348. The clause is intended to make it clear that a person must not make a complaint to the Commission in relation to particular conduct if it has already done so under any of the following:

- the Bill
- the AHRC Act (as in force before the commencement of this Bill)
- Part 3-1 of the *Fair Work Act 2009*, or
- a State or Territory anti-discrimination law, and

the complaint did not fail for want of jurisdiction.

349. The clause is intended to preserve existing policy, which is that a complainant may have a choice as to which jurisdiction to make a complaint, but once that choice has been exercised, unless the complaint failed for want of jurisdiction, the complaint cannot be made in another jurisdiction.

350. It is intended that under subclause 90(2) the Commission will use the discretion prudently and only once satisfied that exceptional circumstances warrant permitting the person to make a complaint.

351. For example if a person made a complaint, then due to a natural disaster (bushfire, flood etc) was no longer able to participate in the complaint process and therefore the complaint was closed/terminated, the person may at a later stage seek that the Commission permit the complaint due to the exceptional circumstances. It is not intended to permit complaints where the Commission considers a complainant might have better prospects under the Bill as compared to another jurisdiction in which they have already filed a complaint.

*Subdivision B—Additional provisions relating to making etc. representative complaints*

Clause 91—Complaint must identify the affected parties

*Overview*

352. Clause 91 provides that a representative complaint must describe or identify in some way the affected parties, and that in identifying the affected parties it is not necessary to name them or specify how many affected parties there are.

*Previous provision*

<b>New provision</b>	<b>Old provisions</b>
Clause 91	Subsections 46P(2)–(3), AHRC Act

*Analysis*

353. This clause is intended to preserve the existing policy, the only changes are to reflect updated drafting practices.

Clause 92—Withdrawal of affected party

*Overview*

354. Clause 92 provides for when and how an affected person can withdraw from a representative complaint. Subclause 92(3) provides that if a person stops (under subclause 92(1)) being an affected party in relation to the representative complaint, clause 90 does not prevent the person from making a complaint to the Commission in relation to the same conduct.

*Previous provision*

<b>New provision</b>	<b>Old provisions</b>
Clause 92	Subsections 46PC(1), AHRC Act

*Analysis*

355. This clause is intended to preserve the existing policy. Any changes are to reflect updated drafting practices and more clearly articulate the process of withdrawing from a representative complaint. In addition, subclause 92(3) makes it clear that a person who withdraws from a representative complaint is not prohibited by clause 90 from making a complaint to the Commission in relation to the same conduct.

Clause 93—Replacement of complainant

*Overview*

356. Clause 93 outlines that the Commission can replace a complainant with another person if requested to do so by an affected party in writing, and that the other person needs to consent to becoming a complainant.

*Previous provision*

<b>New provision</b>	<b>Old provision</b>
Clause 93	Subsections 46PC(2), AHRC Act

*Analysis*

357. This clause is not intended to significantly change policy, other than to provide that the Commission can only replace a complainant if the proposed new complainant consents.

Clause 94—Directions requiring complainant to notify affected party of a matter

*Overview*

358. Clause 94 outlines that the Commission can direct a complainant to give notice of any matter to one or more affected parties of the representative complaint.

*Previous provision*

<b>New provision</b>	<b>Old provision</b>
Clause 94	Subsections 46PC(3), AHRC Act

*Analysis*

359. This clause is intended to preserve the policy of subsection 46PC(3) of the AHRC Act.

360. Subclause 94(2) provides that a direction by the Commission under subclause 94(1) that is made in writing is not a legislative instrument for the purposes of the *Legislative Instruments Act 2003* and is included to assist readers. Notwithstanding this provision, the direction would not be a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act*.

*Subdivision C— Other matters relating to making etc. complaints*

Clause 95—Formal requirements for making a complaint

*Overview*

361. Clause 95 provides that a complaint must be in writing and be given or sent to the Commission.

*Previous provision*

<b>New provision</b>	<b>Old provision</b>
Clause 95	Subsections 46P(1), AHRC Act

*Analysis*

362. This clause is intended to preserve the current policy in relation to making a complaint. A complaint must be in writing and the Commission can accept a complaint in a number of ways, including by post, fax or online.

## Clause 96—Preparation of complaints: assistance from the Commission

### *Overview*

363. Clause 96 provides that the Commission must take reasonable steps to provide assistance to a person if it is aware the person would like to make a complaint and the person needs assistance to put the complaint in writing.

### *Previous provision*

<b>New provision</b>	<b>Old provision</b>
Clause 96	Subsections 46P(4), AHRC Act

### *Analysis*

364. This clause is intended to preserve the current policy in relation to the Commission providing assistance to put a complaint in writing. Given the Commission has responsibility for dispute resolution, it is only intended that the Commission will assist in reducing the complaint to writing, not in actually formulating the complaint.

## Clause 97—Preparation of complaints: people in custody

### *Overview*

365. Clause 97 outlines the assistance that a person in custody is entitled to when preparing a complaint to the Commission.

### *Previous provisions*

<b>New provision</b>	<b>Old provisions</b>
Clause 97	Subsections 20(6)–(8), AHRC Act.

### *Analysis*

366. This clause is not intended to significantly change existing policy. This clause is intended to apply to all complaints (unlawful conduct and Commonwealth conduct contrary to human rights).

367. It is intended that detention in custody would include, but not be limited to, facilities such as prison, immigration detention centres and mental health facilities.

368. The custodian is the person providing the assistance to the detainee on their request in relation to the entitlements in subclause 97(3). It is intended that the custodian will act as a conduit for the detainee to provide information in relation to a complaint to the Commission and for the Commission to provide information about a complaint to the detainee.

369. Subclauses 97(4) and (5) are consistent with the policy in subsections 20(7) and (8) of the AHRC Act, but reflect updated drafting.

## Clause 98—Amending a complaint

### *Overview*

370. Clause 98 outlines the process for amending a complaint to the Commission.

### *Previous provisions*

<b>New provision</b>	<b>Old provision</b>
Clause 98	Section 46PA, subsections 46PF(3)–(4), AHRC Act.

### *Analysis*

371. This clause is intended to broadly preserve the current policy in relation to amending complaints. A complainant with the leave of the Commission is able to amend a complaint in any respect (for example, to add another person as a respondent or an aggrieved person).

372. However, the ability of a respondent to amend a complaint to add another respondent in subsection 46PF(3) of the AHRC Act has not been replicated in this Bill. This provision is very unusual and is not available under State or Territory anti-discrimination laws. A respondent will still have the ability to inform the complainant whether, in their opinion, another person should be named as a respondent. The complainant then has the discretion as to who they decide to bring their complaint against.

## Clause 99—Withdrawing a complaint

### *Overview*

373. Clause 99 outlines the process for withdrawing a complaint to the Commission.

### *Previous provision*

<b>New provision</b>	<b>Old provision</b>
Clause 99	Section 46PG, AHRC Act.

### *Analysis*

374. No change is intended to the existing policy of this provision.

## **Part 4-2—How the Commission deals with complaints**

### **Division 1—Guide to this Part**

#### Clause 100—Guide to this Part

375. Clause 100 provides a guide to Part 4-2 of the Bill.



## **Division 2—Duration of Commission’s obligations to deal with complaints**

### Clause 101—Duration of Commission’s obligations to deal with complaint

#### *Overview*

376. Clause 101 outlines when the Commission’s obligations in relation to a complaint end.

#### *Previous provisions*

377. Clause 101 is a new provision.

#### *Analysis*

378. This clause is intended to provide a clear representation of when the Commission’s obligations for dealing with a complaint end. The clause provides assistance to readers, by identifying in one place in the Bill the range of approaches the Commission may take in relation to a complaint. The Commission’s obligations in relation to a complaint will cease if one of the following has occurred:

- the complaint is withdrawn under clause 99
- because of the complaint, the Commission refers an instrument to another body under clause 102
- the Commission refers the complaint to the Inspector-General of Intelligence and Security under clause 103
- the Commission refers the complaint to the Information Commissioner under clause 104
- the Commission has complied with Division 5 in relation to the complaint, or
- the Commission closes the complaint under clause 117, and the closure has not been revoked under that section.

## **Division 3—Referral of complaints and instruments to other bodies**

### Clause 102—Referral of industrial instruments that authorise or require conduct that would otherwise be unlawful discrimination

#### *Overview*

379. Clause 102 provides that if the Commission receives a complaint and considers that the conduct to which the complaint relates would be unlawful discrimination, but for the fact that the conduct is necessary to comply with an instrument of the kind referred to in paragraph 31(2)(c), the Commission must refer the instrument to one of the following bodies who made the instrument:

- Fair Work Australia
- the Remuneration Tribunal, or
- the Defence Force Remuneration Tribunal.

*Previous provisions*

<b>New provision</b>	<b>Old provisions</b>
Clause 102	Sections 46PW, 46PX and 46PY, AHRC Act.

*Analysis*

380. This clause is broadly intended to preserve the policy of the existing provisions in the AHRC Act on referral of complaints and instruments to other bodies that are best placed to deal with these matters. However, consolidating the Acts in this Bill has provided an opportunity to streamline the provisions in the AHRC Act dealing with referral of industrial instruments and therefore drafting has been significantly clarified.

381. A change from the current provisions in the AHRC Act, is that if the Commission becomes aware of an instrument of the kind referred to under paragraph 31(2)(c) that requires a person to engage in conduct that would be unlawful conduct, without receiving a complaint, the Commission may refer the instrument to one of the relevant bodies listed above in accordance with subclause 102(1). This ensures that a person may make a complaint either alleging unlawful conduct or, already recognising that the conduct is not unlawful (because of the industrial instrument) to activate the review of the instrument.

382. Another change is to apply the exemption and referral mechanism uniformly across all attributes. Consequential amendments will be made to the *Fair Work Act 2009*, *Defence Act 1903* and *Remuneration Tribunal Act 1973* for consistency with the Bill.

Clause 103—Referral of complaints to Inspector-General of Intelligence and Security

*Overview*

383. Clause 103 provides that the Commission is not to investigate or conciliate complaints relating to conduct by intelligence agencies or that are otherwise related to activities of intelligence agencies.

*Previous provisions*

<b>New provision</b>	<b>Old provision</b>
Clause 103	Subsection 11(3), AHRC Act.

*Analysis*

384. This provision is intended to preserve the existing policy expressed in the AHRC Act.

385. Complaints relating to intelligence agencies are most appropriately dealt with by the Inspector-General of Intelligence and Security. As noted in the Bill, the powers of the Inspector-General extend to inquiring into conduct of intelligence agencies that is contrary to human rights under section 8 of the *Inspector-General of Intelligence and Security Act 1986*. Consequential amendments will be made to the *Inspector-General of Intelligence and Security Act 1986* for consistency with the Bill.

## Clause 104—Referral of complaints to Information Commissioner

### *Overview*

386. Clause 104 outlines that the Commission may refer a complaint that alleges Commonwealth conduct contrary to human rights to the Information Commissioner if it considers that the complaint could be more effectively or conveniently dealt with by the Information Commissioner (ie if the complaint related to the right to privacy).

### *Previous provisions*

<b>New provision</b>	<b>Old provisions</b>
Clause 104	Subsections 20(4A) and (4B), AHRC Act.

### *Analysis*

387. This clause is intended to preserve the existing policy expressed in the AHRC Act. Consequential amendments will be made to the *Privacy Act 1988* for consistency.

## **Division 4—Investigation and conciliation of complaints**

### *Subdivision A—General provisions*

## Clause 105—Commission to investigate and/or conciliate complaints

### *Overview*

388. Clause 105 outlines that the Commission, upon receipt of a complaint, must do any of the following it considers appropriate:

- investigate the complaint
- attempt to conciliate the complaint, or
- both investigate, and attempt to conciliate, the complaint.

389. The Commission is also able to conduct a single investigation or conciliation in relation to two or more complaints if it considers that the complaints arise out of the same or substantially the same circumstances.

### *Previous provisions*

<b>New provision</b>	<b>Old provisions</b>
Clause 105	Subsections 46PF(1)–(2), paragraph 11(1)(f) and paragraph 31(1)(b) of the AHRC Act

### *Analysis*

390. This provision is generally consistent with the policy expressed in the AHRC Act, but has been drafted to provide a streamlined provision for conciliation and investigation of complaints. It recognises that investigation and/or conciliation may not be appropriate if

the complaint can otherwise be disposed of, including if the complaint is unmeritorious and can be closed without involving the respondent.

391. This clause is intended to maintain the importance placed on the Commission attempting to resolve complaints through conciliation, which is a low-cost, informal and flexible alternative dispute resolution mechanism.

Clause 106—Commission’s general discretion as to how to conduct investigation or conciliation

*Overview*

392. Clause 106 provides that complaints may be conducted in any way the Commission considers appropriate, and the Commission is not bound by the rules of evidence.

*Previous provisions*

<b>New provision</b>	<b>Old provisions</b>
Clause 106	Subsections 14(1), AHRC Act.

*Analysis*

393. This clause is intended to preserve the existing policy expressed in the AHRC Act.

*Subdivision B—Additional provisions relating to investigation*

Clause 107—Power to obtain information etc.

*Overview*

394. Clause 107 gives the Commission powers to obtain information, including powers to require a person to give information or produce documents to the Commission. Notices requiring production of information must not provide less than 14 days for compliance and must set out the effect of clause 201 (failure to comply with a notice).

*Previous provisions*

<b>New provision</b>	<b>Old provisions</b>
Clause 107	Subsections 46PI(1)–(3), AHRC Act.

*Analysis*

395. This provision is generally consistent with the policy expressed in the AHRC Act.

396. Clause 107 does not reproduce the requirement of subsection 46PI(3) of the AHRC Act that information must be signed by the person providing the information, which reflects current drafting practice.

## Clause 108—Inspection, retention etc. of documents

### *Overview*

397. Clause 108 provides rules for how the Commission can handle information that is provided to it. In particular, the Commission may:

- inspect a document
- make and retain copies of a document, and
- take possession of a document.

398. Where a person would otherwise be entitled to possession of a document, he or she must be supplied with a certified true copy of the document by the Commission, which must be received in all courts and tribunals as evidence as though it were the original (subclauses 108(4) and (5)). Until a copy is supplied, the person must be provided with access to the document and to make copies of it (subclause 108(6)).

### *Previous provisions*

<b>New provision</b>	<b>Old provisions</b>
Clause 108	Subsections 46PI(4)–(5), AHRC Act.

### *Analysis*

399. This provision is generally consistent with the policy expressed in the AHRC Act.

### *Subdivision C—Additional provisions relating to conciliation*

## Clause 109—Commission may hold conferences

### *Overview*

400. Clause 109 provides that the Commission is able to hold conferences for the purpose of conciliating a complaint.

401. The Commission is able to invite complainants, respondents and any other person to attend the conference, if it reasonably believes the person is capable of giving information or considers that the person's presence is likely to be conducive to the conciliation.

402. Subclauses 109(3)–(5) provide that the Commission may also require people to attend a conference by written notice. Notices requiring attendance at a conference must specify the time and the place of the conference, not being a time that is less than 14 days after the notice has been given, and the Commission must pay the reasonable costs for a person's attendance where this has been required.

### *Previous provisions*

<b>New provision</b>	<b>Old provision</b>
Clause 109	Subsection 46PJ, AHRC Act.

### *Analysis*

403. This provision is generally consistent with the policy expressed in the AHRC Act.

404. It does however, provide a distinction between when the Commission invites a person to attend a conference and when the Commission compels a person to attend a conference. This is to reflect the fact that in the majority of cases parties to complaints voluntarily agree to participate in the Commission's conciliation process and are therefore not required to attend a conciliation conference. Failure to comply with a notice from the Commission requiring attendance at a conference under subclause 109(3) is an offence under clause 202.

### Clause 110—Proceedings at conferences

#### *Overview*

405. Subclause 110(1) provides that the Commission may conduct conferences in any way it considers appropriate.

406. Subclauses 110(2) and (3) provide that the conference must be held in private and the person presiding over the conference must take all reasonable steps to ensure that a complainant or respondent are not disadvantaged.

407. Subclause 110(4) outlines the circumstances under which an individual or body may be represented at a conference.

408. Subclause 110(5) provides that if an individual is unable to attend a conference because of their disability, they are able to nominate a person to attend on their behalf. Subclause 110(6) provides that if an individual with a disability is unable to fully participate in the conference, they are able to nominate a person to assist them at the conference.

#### *Previous provisions*

<b>New provision</b>	<b>Old provision</b>
Clause 110	Section 46PK, AHRC Act.

### *Analysis*

409. This provision is generally consistent with the policy expressed in the AHRC Act, but clarifies that the matters provided for under this clause apply to all conferences, whether a person attends voluntarily or is required by notice to attend.

### Clause 111—Things said in conciliation are not admissible in evidence

#### *Overview*

410. Clause 111 provides that anything said or done in the course of conciliation is not admissible in evidence in any court, or in any proceedings before a person authorised to hear evidence.

*Previous provisions*

411. Clause 111 is a new provision.

*Analysis*

412. While it is generally understood that conciliation proceedings are confidential, the current AHRC Act does not fully reflect this understanding. This clause makes it clear that conciliation is confidential and that anything said or done by a person in the course of the conciliation is not admissible in evidence.

413. This is consistent with information from the National Alternative Dispute Resolution Advisory Council (NADRAC) that ADR processes are usually confidential. Ensuring that ADR processes are confidential are said to encourage parties to actively take part and provide information in the conciliation process, knowing that what is said in the session stays in the session.

**Division 5—Complaints alleging Commonwealth conduct contrary to human rights that cannot be settled by conciliation.**

Clause 112—Complaints to which this Division applies

*Overview*

414. Clause 112 outlines that Division 5 applies to complaints alleging Commonwealth conduct contrary to human rights where the Commission is satisfied it is unable to settle a complaint through conciliation and the Commission’s obligations to deal with the complaint have not already ended under clause 101.

*Previous provisions*

<b>New provision</b>	<b>Old provision</b>
Clause 112	Paragraph 11(1)(f), AHRC Act.

*Analysis*

415. This clause is not intended to significantly change existing policy, but to clarify when the Commission is required to make a finding and produce a report in relation to a complaint that alleges Commonwealth conduct that is contrary to human rights.

416. This Division is intended to provide a place in the Bill that clearly outlines the Commission’s functions in relation to complaints alleging Commonwealth conduct contrary to human rights that cannot be settled by conciliation.

417. The policy that complaints alleging Commonwealth conduct contrary to human rights cannot be taken to court if they cannot be conciliated, unlike complaints about unlawful conduct, remains unchanged.

## Clause 113—Commission to make a finding

### *Overview*

418. Subclause 113(1) provides that the Commission must make a finding in relation to whether the conduct complained of is Commonwealth conduct contrary to human rights.

419. Subclause 113(2) provides that the Commission must not make such a finding unless it has provided the respondent/s a reasonable chance to make submissions on the matter to the Commission.

### *Previous provisions*

<b>New provision</b>	<b>Old provision</b>
Clause 113	Section 27, AHRC Act.

### *Analysis*

420. This clause is not intended to significantly change existing policy, but to clarify that the Commission must make a finding in relation to whether the conduct complained of is Commonwealth conduct contrary to human rights. Subclause 113(2) maintains current policy, which provides the alleged contravener the opportunity to comment and make submissions on any proposed adverse findings.

## Clause 114—Report to complainants and respondents

### *Overview*

421. Clause 114 provides that the Commission is required to give a written report to each complainant and respondent, which sets out a finding and reasons for that finding, and may set out any recommendations the Commission considers appropriate.

### *Previous provisions*

<b>New provision</b>	<b>Old provision</b>
Clause 114	Subsection 29(2), AHRC Act.

### *Analysis*

422. This clause is not intended to significantly change existing policy, but reflects simplified and streamlined drafting. This clause makes it clear that a report must be provided to both each complainant and each respondent.

423. The Bill provides some examples of the types of recommendations that the Commission may make to a respondent in a report. These include, but are not limited to, recommendations such as:

- compensation for loss or damage
- the taking of an action to remedy or reduce loss or damage, or
- the taking of particular measures to stop similar conduct from reoccurring.



424. The provision of subclause 114(2) that a report by the Commission in relation to Commonwealth conduct contrary to human rights is not a legislative instrument for the purposes of the Legislative Instruments Act 2003 is included to assist readers. Notwithstanding this provision, the direction would not be a legislative instrument within the meaning of section 5 of the Legislative Instruments Act.

Clause 115—Report to Minister

*Overview*

425. Clause 115 provides that if the Commission finds that the conduct complained of is Commonwealth conduct contrary to human rights, the Commission may give the Minister a report in writing.

426. If the Commission gives the Minister a report, subclause 115(2) outlines the requirements of what must be included in the report and subclause 115(3) outlines who the Commission must also provide a copy of the report to.

427. A report under this clause must be tabled in Parliament in accordance with clause 192.

*Previous provisions*

New provision	Old provisions
Clause 115	Paragraph 11(1)(f)(ii) and subsection 29(2), AHRC Act.

*Analysis*

428. This clause is not intended to significantly change existing policy, other than to replace the *requirement* to provide the Minister with a report with a *discretion* to do so. This will provide the Commission with greater flexibility in deciding whether to provide a report to the Minister. For example, the Commission may provide the Minister with a report in relation to a particularly serious finding of Commonwealth conduct that is contrary to human rights, but may choose not to do so if the Commonwealth has already changed its practices since the relevant conduct occurred. This does not limit the requirement under clause 114 that the Commission *must* provide a report to each complainant and each respondent.

429. Subclauses 115 (2) and (3) are largely based on the existing provisions.

430. The provision of subclause 115(4) that a report by the Commission to the Minister in relation to Commonwealth conduct contrary to human rights is not a legislative instrument for the purposes of the *Legislative Instruments Act 2003* is included to assist readers. Notwithstanding this provision, the direction would not be a legislative instrument within the meaning of section 5 of the Legislative Instruments Act.

Clause 116—Omission of certain material from reports

*Overview*

431. Clause 116 provides that the Commission is able to exclude material from a report under clause 114 or 115 if it considers it desirable to do so having regard to any of the matters

listed in subclause 197(3) and the obligations in subclause 197(4) (which permits the Commission to restrict publication of certain matters).

432. Subclause 116(2) provides that if the Commission excludes material from a report to the Minister, the Commission must give the Minister a further written report setting out the excluded material and the reasons for the exclusion. This report does not have to be tabled in Parliament.

*Previous provisions*

<b>New provision</b>	<b>Old provisions</b>
Clause 116	Subsections 14(3)–(6) and 29(4)–(5), AHRC Act.

*Analysis*

433. This clause is largely consistent with the current policy.

434. In deciding whether to exclude certain material, the Commission must, in relation to subclause 197(3) and (4), have regard to the need to prevent such of the following as are relevant in the circumstances:

- prejudice to the security, defence or international relations of Australia
- prejudice to relations between the Commonwealth Government and the Government of a State or between the Government of a State and the Government of another State
- the disclosure of deliberations or decisions of the Cabinet, or of a Committee of the Cabinet, of the Commonwealth or of a State
- the disclosure of:
  - deliberations or advice of the Federal Executive Council, or the Executive Council of a State, or
  - deliberations or decisions of the Australian Capital Territory Executive or a committee of that Executive
- prejudice to the proper administration of justice
- the endangering of the life or physical safety of any person
- the disclosure of information the disclosure of which is prohibited (absolutely or subject to qualifications) by or under a law
- the unreasonable disclosure of the personal affairs of any person
- the unreasonable disclosure of confidential commercial information, or
- the disclosure of material that is protected against disclosure by legal professional privilege or any other duty of confidence.

435. Under subclause 197(4) the Commission is required to try to achieve an appropriate balance between the factors listed above and the desirability of ensuring that those sufficiently interested are informed of the outcomes of a complaint.

436. The provision of subclause 116(3) that a report under subclause 116(2) by the Commission to the Minister setting out excluded material and the reasons for excluding

the material is not a legislative instrument for the purposes of the Legislative Instruments Act 2003 is included to assist readers. Notwithstanding this provision, the direction would not be a legislative instrument within the meaning of section 5 of the Legislative Instruments Act.

## **Division 6—Closing complaints**

### Clause 117—Closing a complaint

#### *Overview*

437. Clause 117 outlines the circumstances when the Commission can close a complaint and the Commission’s obligations to provide written notice if it closes a complaint.

#### *Previous provisions*

<b>New provision</b>	<b>Old provisions</b>
Subclause 117 (1)	Subsections 46PF(5)(a)–(b), 20(2)(b) and 20(2)(c)(vii), AHRC Act
Subclause 117(2)	Subsections 46PH(a)–(i) and 20(2)(c)(i)–(vi), AHRC Act
Subclause 117(3)	Section 46PE, AHRC Act
Subclauses 117(4)–(5)	Subsection 20(4), AHRC Act
Subclause 117(6)	Subsection 46PH(4), AHRC Act

#### *Analysis*

438. Clause 117 streamlines the provisions for closing complaints, covering both closure of complaints requiring no further action and other circumstances in which the Commission may close complaints. Terminology has changed from ‘terminating a complaint’ to ‘closing a complaint’.

439. Under subclause 117(1) the Commission may close a complaint if the Commission is satisfied the complaint has been settled. The Commission may also close a complaint if it is satisfied that the affected parties do not want the Commission to deal with the complaint or continue to deal with it. This is also intended to cover situations of ‘deemed withdrawal’ where the Commission has had no continuing contact with the complainant and is therefore satisfied they do not wish to proceed with the matter. If the Commission closes a complaint under this subclause, an aggrieved person is not able to make a complaint to the Federal Court or Federal Magistrates Court. This is consistent with the current policy.

440. Subclause 117(2) is largely in line with the existing grounds for terminating a complaint under section 46PH and paragraph 20(2)(c) of the AHRC Act. As is the current policy, if a complaint alleging unlawful conduct is closed under this subsection, application may be made to the Federal Court or Federal Magistrates Court (with some exceptions).

441. If a complaint of unlawful conduct is closed under paragraphs (a) to (e), an application cannot be made to the Federal Court or the Federal Magistrates Court, unless that court grants leave to make the application. The requirement to seek leave is noted under this subclause, but is dealt with under clause 121. The rationale for limiting access to the courts is to provide the Commission with an increased ability to dismiss clearly unmeritorious complaints and to focus resources on meritorious complaints; this in turn should limit the number of unmeritorious complaints being brought before the courts. With the early dismissal of unmeritorious complaints comes the potential deregulatory benefit of only involving respondents in the matter when there is an arguable matter to be dealt with.
442. Paragraph 117(2)(h)(ii) is a new concept in relation to the closure of complaints alleging that Commonwealth conduct is contrary to human rights. This paragraph is similar to paragraph 11(2)(c) of the *Inspector-General of Intelligence and Security Act 1986*. If a complaint is closed under paragraph 117(2)(h) the Commission does not have to make a finding on the question of whether the conduct is Commonwealth conduct that is contrary to human rights and is not required to take any further action. It is intended to give the Commission greater flexibility to use its resources to focus on complaints that raise the most significant human rights issues.
443. Subclause 117(3) permits a complaint against the Commission or a Commission member to be closed, and proceed straight to court if all parties agree. This recognises it might be difficult for the Commission to conciliate a matter to which it is a party.
444. Subclauses 117(4)–(6) are not intended to significantly change current policy. Subclause 117(4) only requires the Commission to give a complainant written notice of the closure and the reasons for doing so. The Commission can notify the respondent if it is thought appropriate (for example, if it has already notified a respondent that a complaint has been made against them).

## **Part 4-3—Applying to the Federal Court or the Federal Magistrates Court in relation to unlawful conduct**

### **Division 1—Guide to this Part**

#### Clause 118—Guide to this Part

445. Clause 118 provides a guide to Part 4-3 of the Bill.

### **Division 2—Application to court if unlawful conduct complaint closed**

#### Clause 119—When this Division applies

##### *Overview*

446. Clause 119 provides that an application to court can be made if a complaint alleging unlawful conduct has been closed under subclauses 117(2) or (3).

*Previous provisions*

<b>New provision</b>	<b>Old provisions</b>
Clause 119	Paragraph 46PO(1)(a), AHRC Act.

*Analysis*

447.No change is intended to the existing policy of this provision.

Clause 120—Application to court alleging unlawful conduct

*Overview*

448.Clause 120 provides that subject to clauses 121–123 (relating to seeking leave, standing and time limits for making a complaint), a person may make an application to the Federal Court or the Federal Magistrates Court alleging unlawful conduct. The unlawful conduct alleged must be the same as the conduct to which the complaint to the Commission related or must arise out of the same conduct.

*Previous provisions*

<b>New provision</b>	<b>Old provisions</b>
Clause 120	Paragraph 46PO(b) and subsection 46PO(3), AHRC Act.

*Analysis*

449.No change is intended to the existing policy of this provision.

Clause 121—Leave required in some circumstances

*Overview*

450.Clause 121 provides that if a person’s complaint was closed on any ground under clause 117(2)(a)–(e), that person cannot make an application to court unless the Federal Court or the Federal Magistrates Court grants leave.

*Previous Provisions*

451.Clause 121 is a new provision.

*Analysis*

452.Clause 121 is inherently linked to clause 117. If a complaint was closed by the Commission on any ground under clause 117(2)(a)–(e), a person must be granted the leave of the court before they can commence proceedings in the Federal Court or the Federal Magistrates Court. If the Commission closes a complaint under one of those listed grounds, a person will need to make the case to the court why the matter should be allowed to proceed further. It is intended that the Commission’s and the court’s resources, as well as those of respondents, are focused on resolving issues of merit.

453. Subclause 121(2) does not limit the way the court may decide to deal with an application for leave, but is intended to provide the court with flexibility, for example, dealing with the application without a hearing.

#### Clause 122—Persons who may make an application

##### *Overview*

454. Clause 122 provides for who may make an application to court alleging unlawful conduct or seeking leave to make an application.

##### *Previous provisions*

<b>New provision</b>	<b>Old provision</b>
Clause 122	Subsection 46PO(4), AHRC Act.

##### *Analysis*

455. This clause is intended to make it clear that a person who is an affected party in relation to a complaint may make an application to court alleging unlawful conduct under clause 120 or an application for leave under clause 121. No change is intended to the current policy of this provision.

#### Clause 123—Time limits

##### *Overview*

456. Clause 123 outlines that an application to the court alleging unlawful conduct (clause 120) or an application for leave (clause 121) must be made within 60 days of receiving notice of closure of the complaint by the Commission, or within such further time as the court allows.

##### *Previous provisions*

<b>New provision</b>	<b>Old provision</b>
Clause 123	Subsection 46PO(2), AHRC Act.

##### *Analysis*

457. No change is intended to the existing policy of this provision, except to clarify a 60 day time limit also applies to applications for leave made under clause 121.

#### Clause 124—Burden of proof in proceedings under section 120 etc.

##### *Overview*

458. Clause 124(1) provides for a shifting burden of proof for the reason or purpose for conduct when unlawful conduct is alleged.

459. Clause 124(2) provides that the burden of proving the conduct is not unlawful because of a special measure to achieve equality, exception, disability standard, compliance code,

special measure determination or temporary exemption lies with the person alleged to have engaged in the unlawful conduct.

460. Clause 124(2)–(4) provide that the burden of proving that a person did not engage in, or have a liability for, conduct because they took reasonable precautions or complied with a compliance code lies on that person.

*Previous provisions*

New provision	Old provisions
Clause 124	Subsection 15(2), ADA
	Subsection 6(4), DDA
	Section 7C, SDA

*Analysis*

461. Under the direct discrimination tests in current Commonwealth anti-discrimination law, the burden of proving that the respondent treated the applicant less favourably falls on the complainant. Under the current indirect discrimination tests, once an applicant has established the discriminatory impact of a condition, requirement or practice, the ADA, DDA and SDA shift the burden of proving that the discriminatory condition was reasonable to the respondent.

462. Under clause 124 the shifting burden rule only applies in relation to the reason or purpose why a person engaged in conduct when unlawful conduct is alleged. The rest of the core elements of each form of unlawful conduct will have to be proved by the applicant.

463. In practice, this will require the applicant to first establish a prima facie case that the unlawful discrimination occurred before the burden shifts to the respondent to demonstrate a non-discriminatory reason for the action, that the conduct is justifiable or that another exception applies. The applicant will not be required to disprove the application of defences and exceptions. The policy rationale behind this is that the respondent is in the best position to know the reason for the discriminatory action and to have access to the relevant evidence.

464. For example, a person claiming discrimination on the basis of their sexual orientation at work would need to show they are of the particular sexual orientation (or within the extended meaning e.g. they are assumed to be of that sexual orientation), that they were treated unfavourably and that it was connected with an area of public life. They would also need to show evidence from which it could be concluded that the unfavourable treatment was because of their sexual orientation (eg disparaging or offensive remarks by the respondent). The burden would then shift to the respondent to explain the real reasons for the treatment or otherwise justify the conduct.

Clause 125—Orders that court may make on application under section 120

## Overview

465. Subclause 125(1) provides that if the court is satisfied that there has been unlawful conduct by a respondent, the court may make such orders as it considers appropriate. This broad power is then supplemented, but not limited, by a range of possible orders that the court may make, as set out in subclause 125(2):

- an order declaring that a respondent has engaged in unlawful conduct, and directing the respondent not to repeat or continue such conduct
- an order requiring a respondent to perform any reasonable act or course of conduct aimed at ensuring that the respondent does not again engage in the same or similar unlawful conduct
- an order requiring a respondent to perform any reasonable act or course of conduct to redress any loss or damage suffered by an affected party
- an order requiring a respondent to employ or re-employ an affected party
- an order requiring a respondent to pay damages to an affected party
- an order requiring a respondent to vary the termination of a contract or agreement to redress any loss or damage suffered by an affected party, and
- an order declaring that it would be inappropriate for any further action to be taken in the matter.

## Previous provisions

New provision	Old provisions
Clause 125	Subsections 46PO(4)–(5), AHRC Act.

## Analysis

466. This clause is not intended to significantly change existing policy.

467. In addition to the court's specific discretion to make any orders it considers appropriate, paragraph 125(2)(b) has been included to provide for an order which focusses on systemic orders to attempt to stop such conduct from happening again in the future. The court may make an order requiring the respondent to perform any reasonable act or course of conduct aimed at ensuring future compliance with the Bill. An order of this nature could, for example, include changing policies, directing specific staff training or reviewing internal practices. This implements recommendation 23 of the SDA report.

468. Paragraph 125(2)(e) does not seek to change the current policy, but rather clarify that an order of damages under this clause does not have to be limited to damages by way of compensation.

## Clause 126—Interim injunctions etc. by court to which application is made under section 120

### Overview

469. Clause 126 provides for the court to grant an interim injunction or other interim order if it considers it appropriate to do so in relation to an application made under clause 120, pending the outcome of the proceedings.



470. The court cannot require a person to give an undertaking as to damages under this clause.

*Previous provisions*

<b>New provision</b>	<b>Old provisions</b>
Clause 126	Subsections 46PO(6) and (8), AHRC Act

*Analysis*

471. No change is intended to the existing policy of these provisions.

Clause 127—Report to Commission by court

*Overview*

472. Clause 127 provides that if an application for an order or injunction has been made under this Division, the Federal Court or the Federal Magistrates Court may ask the Commission to provide the court with a written report on a complaint it previously closed. If a request of this nature is made, the Commission must comply.

473. Subclause 127(2) outlines what must not be included in the report and subclause 127(3) provides for material that the Commission may exclude from the report having regard to subclauses 197(3) and (4).

*Previous provisions*

<b>New provision</b>	<b>Old provision</b>
Clause 127	Section 46PS, AHRC Act

*Analysis*

474. Clause 127 is generally intended to preserve existing policy by providing that the Commission may provide the Federal Court or the Federal Magistrates Court a written report.

475. This clause makes it clear that if the Federal Court or the Federal Magistrates Court requests a report from the Commission, the Commission must comply with the request.

476. Subclause 127(3) is a new provision which allows the Commission to exclude material from the written report if it considers it desirable to do so. In deciding whether to exclude certain material, the Commission must have regard to the need to prevent such of the following as are relevant in the circumstances (see subclauses 197(3) and (4)):

- prejudice to the security, defence or international relations of Australia
- prejudice to relations between the Commonwealth Government and the Government of a State or between the Government of a State and the Government of another State
- the disclosure of deliberations or decisions of the Cabinet, or of a Committee of the Cabinet, of the Commonwealth or of a State
- the disclosure of:

- deliberations or advice of the Federal Executive Council, or the Executive Council of a State, or
- deliberations or decisions of the Australian Capital Territory Executive or a committee of that Executive
- prejudice to the proper administration of justice
- the endangering of the life or physical safety of any person
- the disclosure of information the disclosure of which is prohibited (absolutely or subject to qualifications) by or under a law
- the unreasonable disclosure of the personal affairs of any person
- the unreasonable disclosure of confidential commercial information, or
- the disclosure of material that is protected against disclosure by legal professional privilege or any other duty of confidence.

477. Under subclause 127(4) the Commission is required to try to achieve an appropriate balance between the factors listed above and the desirability of ensuring the court is informed of the outcomes of a complaint.

478. The provision of subclause 127(5) that a report by the Commission to the court is not a legislative instrument for the purposes of the *Legislative Instruments Act 2003* is included to assist readers. Notwithstanding this provision, the direction would not be a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act*.

### **Division 3—General power of court to grant interim injunction etc. if complaint of unlawful conduct has been made**

#### Clause 128—Interim injunction etc. to maintain status quo

##### *Overview*

479. Clause 128 provides that the court may grant an interim injunction or other interim order if a complaint of unlawful conduct has been made to the Commission.

##### *Previous provisions*

<b>New provision</b>	<b>Old provision</b>
Clause 128	Section 46PP, AHRC Act

##### *Analysis*

480. This provision is generally consistent with the policy expressed in the AHRC Act. This reflects that complaints cannot be made directly to court, but must first be made in the Commission. It ensures that urgent interim relief can be sought once a complaint has been lodged with the Commission. For example, when a school has refused a student to sit their final exams, but there is not enough time for the Commission to conciliate the complaint prior to the exams commencing.

481. The clause has been drafted to clarify that an interim injunction or other interim order can not only be made to maintain the status quo, but also to re-establish the status quo (for the complainant, respondent or affected party who made the application) as it existed immediately before the conduct was engaged in or the complaint made. This addresses the concern that section 46PP of the AHRC Act was not flexible enough to return a person to the position they were in immediately before the conduct to which the complaint relates was engaged in.

#### **Division 4—Other general provisions**

##### Clause 129—Right of representation

###### *Overview*

482. Clause 129 provides the different means by which a party can be represented in court proceedings under Part 4-3.

###### *Previous provisions*

<b>New provision</b>	<b>Old provision</b>
Clause 129	Section 46PQ, AHRC Act

###### *Analysis*

483. No change is intended to the existing policy of this provision.

##### Clause 130—Assistance in proceedings before the court

###### *Overview*

484. Clause 130 outlines a process whereby a person who has commenced or proposes to commence proceedings, or is a respondent in proceedings under Part 4-3 in the Federal Court or the Federal Magistrates Court can seek legal or financial assistance from the Attorney-General.

###### *Previous provisions*

<b>New provision</b>	<b>Old provision</b>
Clause 130	Section 46PU, AHRC Act

###### *Analysis*

485. No change is intended to the existing policy of this provision.

##### Clause 131—Court not bound by technicalities

###### *Overview*

486. Clause 131 provides that the court is not bound by technicalities or legal forms in proceedings under Part 4-3.

*Previous provisions*

<b>New provision</b>	<b>Old provision</b>
Clause 131	Section 46PR, AHRC Act

*Analysis*

487.No change is intended to the existing policy of this provision.

Clause 132—Discharge or variation of order or injunction under this Part

*Overview*

488.Clause 132 provides that the court has the ability to discharge or vary an order or injunction it has made under Part 4-3.

*Previous provisions*

<b>New provision</b>	<b>Old provision</b>
Clause 132	Subsection 46PO(7), AHRC Act

*Analysis*

489.No change is intended to the existing policy of this provision.

Clause 133—Costs

*Overview*

490.Clause 133 outlines that as a default position, each party is to bear their own costs in proceedings under Part 4-3 in the Federal Court or the Federal Magistrates Court.

491.The court retains its discretion to make orders as to costs if it considers is just to do so.

*Previous provisions*

492.Clause 133 is a new provision.

*Analysis*

493.This change in policy in relation to costs means that as a default position each party will bear their own costs in proceedings, rather than costs following the event as is the case currently, which generally means that the unsuccessful party pays the costs of the successful party. The risk of an adverse cost order is a significant barrier to commencing litigation, even for cases with relative merit. This provision should be considered in conjunction with clauses 117 and 121, which outline the Commission’s ability to dismiss unmeritorious complaints at an early stage.

494.Subclauses (2) and (3) provide the court with the ability to make such orders as to costs as the court considers just (for example, if one party has sought to abuse the judicial process during proceedings). In considering whether there are circumstances that justify

making such an order, there are a range of matters that the court must have regard to, including:

- the financial circumstances of the parties
- whether any of the parties are receiving financial assistance or legal aid assistance
- the conduct of the parties to the proceedings
- whether a party has been wholly unsuccessful in the proceedings;
- whether any party made an offer in writing to settle the matter and the terms of the offer, and
- any other matters the court considers relevant.

## Chapter 5—Inquiries

495. Chapter 5 of the Bill provides for a separate process for the Commission to undertake inquiries. Under the AHRC Act, the Commission’s power to undertake inquiries was contained in the power to consider complaints relating to human rights (Division 3 of Part II), as well as part of the Commission’s general functions (paragraphs 11(1)(e), (j) and (k)). Including provisions relating to inquiries in a separate Chapter from those relating to complaints presents these two separate processes more clearly.

### Part 5-1—Inquiries

#### Division 1—Guide to this Part

##### Clause 134—Guide to this Part

496. Clause 134 provides a guide to Part 5-1 of the Bill.

#### Division 2—Commission may conduct inquiries

##### Clause 135—Matters in relation to which the Commission may conduct inquiries

###### *Overview*

497. Clause 135 empowers the Commission to inquire into a range of areas related to human rights and Commonwealth activity, as follows:

- whether Commonwealth conduct is unlawful conduct or is contrary to human rights
- the laws that should be made by the Commonwealth Parliament—in relation to a matter covered by the objects of this Act, or to better respect or promote human rights
- any action that should be taken by the Commonwealth, or by the Administration of a Territory—in relation to a matter covered by the objects of this Act, or to better respect or promote human rights, and
- any other action that should be taken by Australia to better comply with the human rights instruments or the ILO instruments.

###### *Previous provisions*

<b>New provision</b>	<b>Old provisions</b>
Paragraph 135(a)	Paragraph 11(1)(f) and 31(b), AHRC Act
Paragraph 135(b) and (c)	Paragraph 11(1)(j) and 31(e), AHRC Act
	Paragraph 48(1)(g), SDA
	Paragraph 67(1)(j), DDA
	Paragraph 53(1)(e), ADA

<b>New provision</b>	<b>Old provisions</b>
Paragraph 135(d)	Paragraphs 11(1)(e) and (k) and 31(a) and (f), AHRC Act
	Paragraph 48(1)(f), SDA
	Paragraph 20(f), RDA
	Paragraph 67(i), DDA
	Paragraph 53(1)(d), ADA

### *Analysis*

498. The Commission’s powers to inquire into Commonwealth activities arise under a complex web of provisions in existing anti-discrimination law. Clause 135 preserves the Commission’s existing inquiry powers while substantially simplifying drafting.

499. The reference to ‘Australia’ in paragraph 135(d) is intended to apply to Australia generally, and is not limited to the Federal Government. This recognises that, for the purpose of determining whether action should be taken to better comply with the human rights instruments or ILO instruments (listed at subclauses 3(2) and (3) respectively), when Australia becomes a party to international instruments it takes on obligations as all nine Commonwealth, State and Territory jurisdictions. This power permits the Commission to provide advice as to actions that should be taken in any Australian jurisdiction to better comply with human rights. This is consistent with current policy under paragraph 11(1)(k) of the AHRC Act.

500. In contrast, the reference to ‘Commonwealth’ in the context of ‘Commonwealth conduct contrary to human rights’, for the purposes of both inquiries and complaints, is limited to conduct by the Commonwealth Government. It does not permit the Commission to receive complaints or inquire generally about conduct engaged in by a State or Territory government, a private sector organisation or an individual.

501. The Commission’s existing powers to inquire into acts or practices that may be inconsistent with equal opportunity in employment (subsection 31(b), AHRC Act) are not explicitly reproduced in clause 135, consistent with the approach to remove the separate complaints stream. However:

- unlawful discrimination by employers can be dealt with under the unlawful discrimination provisions of the Bill, and
- conduct by the Commonwealth that may constitute unlawful conduct can be inquired into under clause 135.

### Clause 136—Commission not to inquire into conduct of intelligence agencies

#### *Overview*

502. Clause 136 provides that the Commission is not to inquire into the conduct of intelligence agencies or conduct otherwise related to activities of intelligence agencies.

*Previous provisions*

<b>New provision</b>	<b>Old provision</b>
Clause 136	Subsection 11(3), AHRC Act

*Analysis*

503. This provision is intended to preserve the existing policy expressed in the AHRC Act.

504. Human rights issues relating to intelligence agencies are most appropriately dealt with by the Inspector-General of Intelligence and Security. As noted in the Bill, the powers of the Inspector-General extend to inquiring into conduct of intelligence agencies that is contrary to human rights under section 8 of the *Inspector-General of Intelligence and Security Act 1986*.

Clause 137—Main purpose of inquiry is to make recommendations

*Overview*

505. Clause 137 provides that the main purpose of a Commission inquiry is to consider whether any recommendations should be made in relation to the subject of the inquiry, and, if so, to provide a report to the Minister including those recommendations.

*Previous provisions*

<b>New provision</b>	<b>Old provisions</b>
Clause 137	Sections 29, 35 AHRC Act

*Analysis*

506. This provision is intended to preserve the existing policy expressed in the AHRC Act.

Clause 138—Initiating inquiries

*Overview*

507. Clause 138 provides that a Commission inquiry may be initiated either by the Commission or by the Minister.

508. Inquiries should only be initiated where the Commission or the Minister consider that an inquiry would further the objects of the Bill and is in the public interest.

*Previous provisions*

<b>New provision</b>	<b>Old provisions</b>
Clause 138	Paragraphs 20(1)(a) and (c), and 32(1)(a) and (c), AHRC Act

*Analysis*

509. This provision is intended to preserve the existing policy expressed in the AHRC Act.



510. The requirement that the inquiry advance the objects of the Bill and is in the public interest was not previously explicitly stated. However, it reflects existing practice and will provide guidance to the Minister and the Commission in considering whether to commence inquiries.
511. The provision of subclause 138(3) that a written request by the Minister for the Commission to conduct an inquiry is not a legislative instrument for the purposes of the *Legislative Instruments Act 2003* is included to assist readers. Notwithstanding this provision, the request would not be a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act*.
512. Subclause 138(3) provides a method for determining which Commission member or members should conduct a Commission inquiry. Generally, an inquiry will be conducted by the Commission member or members determined by the Commission.
513. However, where an inquiry has been initiated by a request from the Minister under subclause 138(2), the Minister may request that the inquiry be conducted by a particular member or members. If such a request is made, the Commission must determine that the inquiry is to be conducted by the member/s nominated by the Minister.
514. The provision of subclause 138(4) that a request by the Minister for the inquiry to be conducted by particular members is not a legislative instrument for the purposes of the *Legislative Instruments Act* is included to assist readers. The request would not be a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act*.
515. This provision is intended to formalise arrangements for determining the member conducting an inquiry. The provision is consistent with current practice. It more formally recognises that a particular Commission member may be the most appropriate to conduct an inquiry (eg the Sex Discrimination Commissioner inquiring into a matter relating to sex discrimination or gender equality).

### **Division 3—How inquiries are conducted**

#### Clause 139—Commission’s general discretion as to how to conduct an inquiry;

#### Clause 140—Power to obtain information etc.;

#### Clause 141—Inspection, retention etc. of documents

#### *Overview*

516. Clauses 139–141 provide rules for how the Commission is to conduct inquiries.
517. Clause 139 provides that inquiries may be conducted in any way the Commission considers appropriate, and the Commission is not bound by the rules of evidence.
518. Clause 140 provides the Commission with powers to obtain information, including powers to require a person to give information to the Commission, produce documents, and attend before the Commission to answer questions. Notices requiring production of

information must not provide less than 14 days for compliance, and the Commission must pay the reasonable costs for a person’s attendance where this has been required.

519. Clause 141 provides rules for how the Commission can handle information that is provided to it. In particular, the Commission may:

- inspect a document
- make and retain copies of a document, and
- take possession of a document.

520. Where a person would otherwise be entitled to possession of a document, he or she must be supplied with a certified true copy of the document by the Commission, which must be received in all courts and tribunals as evidence as though it were the original (subclauses 141(4) and (5)). Until a copy is supplied, the person must be provided with access to the document and to make copies of it (subclause 141(6)).

*Previous provisions*

<b>New provision</b>	<b>Old provisions</b>
Clause 139	Subsection 14(1), AHRC Act
Clause 140	Sections 21 and 22, AHRC Act
Clause 141	Subsection 21(4), AHRC Act

*Analysis*

521. This provision is generally consistent with the policy expressed in the AHRC Act.

522. However:

- The requirements of subclause 140(3) that the notice requiring the production of information provide a minimum notice period of 14 days and state the requirements of clause 201 are new—this is consistent with general Commonwealth criminal law policy and current practice by the Commission.
- The provisions of section 22 of the AHRC Act allowing Commission members to administer oaths and take affirmations in conducting inquiries has not been reproduced, reflecting that the Commission is not a judicial, or even inquisitorial, body.
- Section 46PN of the AHRC Act (prohibiting false or misleading information) has not been reproduced, as sections 137.1 and 137.2 of the Criminal Code create offences for providing false or misleading information or documents.
- The requirement of section 21(1)(a) of the AHRC Act that information must be signed by the person providing the information has not been reproduced in clause 140 reflecting current drafting practice.

## Division 4—Reports to Minister

### Clause 142—Commission to report to Minister on inquiry

#### *Overview*

523. Clause 142 provides that the Commission must report to the Minister after completing its inquiry, including any recommendations it may have in relation to the subject of the inquiry.

524. The Commission may exclude material from the report if it considers it desirable to do so, having regard to the considerations in subclauses 197(3) and (4) (for example, where disclosure would affect the life or physical safety of a person). If material is excluded, the Commission must separately report to the Minister setting out the excluded materials and why it was excluded.

#### *Previous provisions*

<b>New provision</b>	<b>Old provisions</b>
Clause 142	Sections 29 and 35, AHRC Act

#### *Analysis*

525. The provision of subclause 142(5) that the reports mentioned in this provision are not legislative instruments for the purposes of the *Legislative Instruments Act 2003* is included to assist readers. The reports would not be a legislative instrument within the meaning of section 5 of the Legislative Instruments Act.

### Clause 143—Commission to give person opportunity to make submissions about their conduct

#### *Overview*

526. Clause 143 provides that the Commission must provide a copy of the draft report to a person and provide a reasonable opportunity to make submissions in relation to the conduct where the report suggests that the person engaged in Commonwealth conduct that is unlawful or contrary to human rights.

#### *Previous provisions*

<b>New provision</b>	<b>Old provisions</b>
Clause 143	Sections 27 and 33, AHRC Act

#### *Analysis*

527. This provision preserves the existing policy of sections 27 and 33 of the AHRC Act.

## **Chapter 6—The Australian Human Rights Commission**

### **Part 6-1—Establishment, functions, powers and liabilities of the Commission**

#### **Division 1—Guide to this Part**

##### Clause 144—Guide to this Part

528.Division 1 provides a guide to Part 6-1 of the Bill.

#### **Division 2—Establishment**

##### Clause 145—Australian Human Rights Commission

###### *Overview*

529.Clause 145 provides for the continued existence of the Commission.

###### *Previous provisions*

<b>New provision</b>	<b>Old provision</b>
Clause 145	Subsection 7(1), AHRC Act

###### *Analysis*

530.There is no change to the policy of subsection 7(1) of the AHRC Act.

531.This provision is necessary because the Bill will repeal the AHRC Act, which establishes the Commission. The Commission is continued in existence, rather than re-established under the Bill, as it will largely continue to have the same functions and to minimise the transitional arrangements regarding the Commissioners, its staff and its operations.

#### **Division 3—Functions**

##### *Subdivision A—General provisions*

##### Clause 146—Functions of the Commission

###### *Overview*

532.Clause 146 sets out the functions of the Commission.

### Previous provisions

New provision	Old provisions
Clause 146	Sections 11, 31, 46C, 46MB, 46PV, AHRC Act
	Section 53, ADA
	Section 67, DDA
	Section 20, RDA
	Section 48, SDA

### Analysis

533. Clause 146 is not intended to change the functions the Commission has under the AHRC Act and the anti-discrimination laws.

534. Consolidation of the functions of the Commission into a single Bill has allowed for a significant simplification of these provisions.

535. A number of functions are no longer explicitly stated but may still be exercised under the functions included in clause 146.

536. For example, the function of the Commission to examine enactments for consistency with human rights (paragraph 11(1)(e), AHRC Act), is no longer explicitly included in the functions of the Commission. However, it is intended that the Commission should be able to do this work under paragraphs 146(d) and (e).

537. Similarly, the powers of Commissioners to appear as *amicus curiae* (section 46PV of the AHRC Act) have been removed. Modern practice in the federal courts does not distinguish this concept from the general concept of intervention (which is explicitly included in the Commission's functions).

Clause 147—The Commission's functions: reports relating to enjoyment and exercise of human rights by Aboriginal persons and Torres Strait Islanders;

Clause 148— The Commission's functions: reports relating to enjoyment and exercise of human rights by children in Australia;

Clause 150—Reporting to Minister about matters arising in performing functions

### Overview

538. Clauses 147, 148 and 150 provide for the Commission's functions to report on:

- the enjoyment of human rights by Aboriginal persons and Torres Strait Islanders
- the enjoyment of human rights by children in Australia, and
- matters arising in performing its functions.

*Previous provisions*

<b>New provision</b>	<b>Old provision</b>
Clause 147	Paragraph 46C(1)(a) and subsections 46(3) and (4), AHRC Act
Clause 148	Paragraph 46MB(1)(a) and subsections 46MB(3) and (5)–(6), AHRC Act
Clause 150	Subsection 13(2), AHRC Act

*Analysis*

539. The AHRC Act currently requires the reports relating to the enjoyment of human rights by Aboriginal persons and Torres Strait Islanders, and by children in Australia to be produced as soon as possible after 30 June each year.

540. The Bill does not require reports to be provided or specify any period within which reports must be produced. Instead, a report may be produced at any time by the Commission on its own initiative, or at the request of the Minister. This change will allow the Commission greater flexibility in performing its functions and allocating its resources, while explicitly retaining these important reporting functions.

Clause 149—Commission’s functions: arrangements with the States

*Overview*

541. Clause 149 empowers the Minister to make an arrangement with a Minister for the performance of functions of the Commission by the State or a State authority, the performance of functions relating to human rights by the Commission on behalf of the State or a State authority, or joint performance of functions of the Commission by the Commission and the State or a State authority.

*Previous provisions*

<b>New provision</b>	<b>Old provision</b>
Clause 149	Sections 16 and 18, AHRC Act

*Analysis*

542. The provision is intended to preserve the policy of section 16, AHRC Act. Section 18 of the AHRC Act separately provided for the Minister to agree that functions conferred on the Commission by a State Act could be performed by the Commission. This is redundant in light of subclause 149(1) (that is, the Minister can arrange with the Minister of a State for the Commission to perform any functions, whether legislated under an Act of that State or not) and the separate provision to this effect has not been reproduced.

543. The requirement to publish notice of the arrangement in the *Gazette* in subsection 16(4) of the AHRC Act has been modernised to refer to the arrangement being a legislative instrument (subclause 149(5)). This will provide greater transparency of these arrangements and ensure they can be easily located (on the Federal Register of

Legislative Instruments). However, as these are fundamentally agreements between two executive governments, these instruments are not subject to disallowance or sunseting.

#### Clause 151—General matters relating to the performance of the Commission’s functions

##### *Overview*

544. Subclause 151(1) sets out general matters that must be considered by the Commission in performing its functions and exercising its powers, including:

- the objects of the Bill
- the indivisibility and universality of human rights, and
- the principle that every person is free and equal in dignity and rights.

545. Subclause 151(2) provides that the Commission may work with and consult other organisations, agencies or persons in performing its functions.

546. Subclause 151(3) provides that the Commission may request information or documents relevant to the performance of its functions from other organisations, agencies or persons.

##### *Previous provisions*

<b>New provision</b>	<b>Old provision</b>
Subclause 151(1)	Section 10A, AHRC Act
Subclause 151(2)	Section 15, AHRC Act
Subclause 151(3)	Sections 46K and 46ML, AHRC Act

##### *Analysis*

547. These provisions are not intended to significantly change existing policy.

548. Subclause 151(2) is expressed in general terms to clarify that the Commission can consult with and request information from other agencies, organisations or individuals. The general power to seek information from any organisation or individual is a non-compellable power. This replaces similar non-compellable powers specifically included in relation to the Aboriginal and Torres Strait Islander Social Justice Commissioner and the National Children’s Commissioner’s functions (sections 46K and 46ML of the AHRC Act respectively).

*Subdivision B —Commission functions and powers that are to be performed by certain Commission members*

Clause 152—Commission functions and powers that are to be performed or exercised by President;

Clause 153—Commission functions and powers that are to be performed or exercised by Aboriginal and Torres Strait Islander Social Justice Commissioner;

Clause 154—Commission functions and powers that are to be performed or exercised by National Children’s Commissioner

*Overview*

549. Clauses 152–154 provide that certain of the functions and powers are to be performed by specific members of the Commission:

- The President: complaints powers (clause 152).
- The Aboriginal and Torres Strait Islander Social Justice Commissioner: reports on the enjoyment of human rights of Aboriginal persons and Torres Strait Islanders, and reports under section 209 of the *Native Title Act 1993* (clause 153).
- The National Children’s Commissioner: reports on the enjoyment of human rights by children in Australia (clause 154).

*Previous provisions*

<b>New provision</b>	<b>Old provision</b>
Clause 152	Subsection 8(6), AHRC Act
Clause 153	Subsection 46C(2), AHRC Act
Clause 154	Subsection 46MB(2), AHRC Act

*Analysis*

550. Clauses 152–154 are generally intended to preserve existing policy by providing that certain members of the Commission are to perform specified functions of the Commission.

551. Under the AHRC Act, the President is the only member with responsibility for resolution of complaints of unlawful discrimination or Commonwealth conduct contrary to human rights. This provides functional separation between the President, who has responsibility for dispute resolution, and the other members of the Commission who have significant advocacy functions.

552. It is also important to ensure the reports on the enjoyment of human rights by Aboriginal and Torres Strait Islander peoples and by children are prepared by the relevant dedicated advocate to ensure the integrity of these processes.



## **Divisions 4 and 5—Powers and Liabilities**

Clause 155—The Commission’s powers;

Clause 156—Commission’s liabilities are Commonwealth liabilities;

Clause 157—Commission has privileges and immunities of the Crown

### *Overview*

553. Clause 155 provides for the Commission’s powers, including:

- the power to do anything necessary or convenient to perform its functions (subclause 155(1)), and
- financial powers (subclauses 155(2)–(7))

554. Clauses 156–157 provide that:

- the Commission’s financial liabilities are Commonwealth liabilities, and
- the Commission has the privileges and immunities of the Crown.

### *Previous provisions*

<b>New provision</b>	<b>Old provision</b>
Clause 155(1)	Subsection 13(1), AHRC Act
Clause 155(2)–(7)	Subsection 7(4)–(6), AHRC Act
Clause 156	None
Clause 157	

### *Analysis*

555. No change is intended to the existing policy of these provisions.

556. However, the provisions relating to the financial powers and liabilities have been redrafted to reflect more recent drafting practice for powers of statutory authorities governed by the *Financial Management and Accountability Act 1997*.

## **Part 6-2—Constitution and membership**

### **Division 1 —Guide to this Part**

Clause 158—Guide to this Part

557. Division 1 provides a guide to Part 6-2 of the Bill.

## **Division 2—Constitution**

### Clause 159—Constitution of the Commission

#### *Overview*

558. Clause 159 constitutes the Commission as a body corporate.

#### *Previous provisions*

<b>New provision</b>	<b>Old provision</b>
Clause 159	Subsections 7(2)–(3), AHRC Act

#### *Analysis*

559. No change has been made to the existing policy of this provision.

## **Division 3—Commission members**

### Clause 160—Membership of the Commission

#### *Overview*

560. Clause 160 provides that the membership of the Commission consists of:

- the President
- the Aboriginal and Torres Strait Islander Social Justice Commissioner
- the Age Discrimination Commissioner
- the Disability Discrimination Commissioner
- the National Children’s Commissioner
- the Race Discrimination Commissioner, and
- the Sex Discrimination Commissioner.

#### *Previous provisions*

<b>New provision</b>	<b>Old provision</b>
Clause 160(1)	Subsection 8(1), AHRC Act

#### *Analysis*

561. Clause 160 does not include a separate position of Human Rights Commissioner.

562. The position of Human Rights Commissioner has not been separately funded or filled since 2000. During that period the work of the Commissioner has been undertaken by

other Commissioners in addition to their own role. The role was most recently undertaken by the President and is currently vacant.

563. It is intended that the work performed by the Human Rights Commissioner will continue to be undertaken by the Commission. However, removal of the statutory office will provide greater flexibility to the Commission to assign the work as appropriate.

564. Subsection 8(2) of the AHRC Act, which required members of the Commission to act in a way that promoted the collegiate nature of the Commission, has not been reproduced.

565. Subsection 8(7) of the AHRC Act, which made provision for performance of the powers of the Commission where there are vacancies in the membership of the Commission, is no longer necessary as a similar rule is provided by subsection 33(2B) of the *Acts Interpretation Act 1901*.

Clause 161—Arrangements for appointment of State judges etc. as Commission members:

Clause 162—Appointment and service not to affect a tenure or rights of judicial office holders

*Overview*

566. Clauses 161 and 162 provide arrangements for the appointment of judicial officers to the Commission.

*Previous provisions*

<b>New provision</b>	<b>Old provision</b>
Clause 161	Section 9, AHRC Act
Clause 162	Section 10, AHRC Act

*Analysis*

567. No change has been made to the existing policy of this provision.

Clause 163—Appointment of Commission members

*Overview*

568. Clause 163 provides for the appointment of Commission members.

*Previous provisions*

<b>New provision</b>	<b>Old provision</b>
Clause 163	Section 8A, AHRC Act
	Section 8B, AHRC Act
	Section 46B, AHRC Act
	Section 46MC, AHRC Act
	Section 19, RDA
	Section 96, SDA
	Section 113, DDA
	Section 53A, ADA

*Analysis*

569. This provision reproduces the policy of existing provisions, with the following exceptions:

- The requirement that the Minister be satisfied as to the qualifications of a candidate for appointment now extends to the President.
- The provision that the President may be appointed on a part-time basis (subsection 8A(1), AHRC Act) has been removed. It was appropriate to provide for the President to be appointed on a part-time basis when the office was not the Chief Executive Officer (CEO) of the Commission and was engaged to make determinations about unlawful discrimination. As the President is now the CEO of the Commission, it can only be performed on a full-time basis.
- Members other than the President can be appointed on a part-time basis. This is primarily to provide flexibility in appointments, such as facilitating the appointment of two people to job share a particular Commission office.

Clause 164—Period of appointment

*Overview*

570. Clause 164 provides that the period of office for members of the Commission is as specified in the instrument of appointment, but may not exceed seven years.

*Previous provisions*

<b>New provision</b>	<b>Old provision</b>
Clause 164	Section 46D(1), AHRC Act
	Section 46MC, AHRC Act
	Subsection 19(1), RD Act
	Section 97(1), SDA
	Section 114(1), DDA
	Section 53B(1), ADA

*Analysis*

571.No change has been made to the existing policy of this provision.

Clause 165—Acting members

*Overview*

572.Clause 165 provides for the appointment of acting members during vacancies or absence of members of the Commission.

*Previous provisions*

<b>New provision</b>	<b>Old provision</b>
Clause165	Section 36, AHRC Act
	Section 46J, AHRC Act
	Section 46ME, AHRC Act
	Section 36, RDA
	Section 103, SDA
	Section 120, DDA
	Section 53H, ADA

*Analysis*

573.No change has been made to the existing policy of this provision.

**Division 4—Terms and conditions for Commission members**

574.Division 4 provides for the terms and conditions of appointment for all Commission members. These provisions significantly rationalise a large number of very similar provisions in the separate Acts that previously set conditions for each of the Commissioners.

Clauses 166—Remuneration and Allowances

*Overview*

575.Clause 166 provides for the remuneration and allowances of Commission members.

*Previous provisions*

<b>New provision</b>	<b>Old provision</b>
Clause 166	Section 38, AHRC Act
	Section 46E, AHRC Act
	Section 46MF, AHRC Act
	Section 31, RDA
	Section 98, SDA
	Section 115, DDA
	Section 53C, ADA

*Analysis*

576.No change has been made to the existing policy of this provision.

Clause 167—Leave of absence

*Overview*

577.Clause 167 provides for recreation leave and other leaves of absence.

*Previous provisions*

<b>New provision</b>	<b>Old provision</b>
Clause 167	Section 39, AHRC Act
	Section 46F, AHRC Act
	Section 46MG, AHRC Act
	Section 32, RDA
	Section 99, SDA
	Section 116, DDA
	Section 53D, ADA

*Analysis*

578.No change has been made to the existing policy of this provision.

Clause 168—Outside employment

*Overview*

579.Subclause 168(1) provides that a full-time Commission member must not engage in paid employment outside the duties of his or her office without the approval of the Minister.

580.Subclause 168(2) provides that a part-time Commission member must not engage in employment that, in the Minister’s opinion, conflicts or may conflict with the proper performance of the member’s duties.

*Previous provisions*

<b>New provision</b>	<b>Old provision</b>
Clause 168	Section 46G, AHRC Act
	Section 46MH, AHRC Act
	Section 35, RDA
	Section 100, SDA
	Section 117, DDA
	Section 53E, ADA

*Analysis*

581. Subclause 168(1) reflects existing policy, except that the provision now extends to the President as well as the other Commission members.

582. Subclause 168(2) provides for part-time members to undertake additional employment outside the Commission, but only where it will not conflict with the performance of their duties with the Commission.

Clause 169—Disclosure of interests to Minister

*Overview*

583. Clause 169 requires Commission members to declare any interests that could conflict with the proper performance of their duties to the Minister in writing.

*Previous provisions*

584. None.

*Analysis*

585. This provision has been included to complement the prohibition on outside employment to reflect current drafting practice for statutory positions.

Clause 170—Disclosure of interests to Commission

*Overview*

586. Clause 170 requires Commission members to declare any interests that could conflict with a matter being considered, or about to be considered, to a meeting of the Commission.

*Previous provisions*

<b>New provision</b>	<b>Old provision</b>
Clause 170	Section 42, AHRC Act

*Analysis*

587.No change has been made to the policy of this provision.

Clause 171—Resignation

*Overview*

588.Clause 171 provides for the resignation of Commission members.

*Previous provisions*

<b>New provision</b>	<b>Old provision</b>
Clause 171	Section 40, AHRC Act
	Section 46H, AHRC Act
	Section 46MI, AHRC Act
	Section 33, RDA
	Section 101, SDA
	Section 118, DDA
	Section 53F, ADA

*Analysis*

589.No change has been made to the existing policy of this provision.

Clause 172—Termination of appointment

*Overview*

590.Clause 172 provides for the circumstances in which the appointment of a Commission member can be terminated.



*Previous provisions*

<b>New provision</b>	<b>Old provision</b>
Clause 172	Section 41, AHRC Act
	Section 46I, AHRC Act
	Section 46MJ, AHRC Act
	Section 34, RDA
	Section 102, SDA
	Section 119, DDA
	Section 53G, ADA

*Analysis*

591.No change has been made to the existing policy of this provision, other than to change from a requirement to terminate an appointment in certain circumstances (bankruptcy, unauthorised absences, unauthorised outside employment) to a discretion to terminate an appointment on those grounds.

592.In addition, the provision of paragraph 41(2)(a) of the AHRC Act that failure to disclose an interest is a ground of dismissal has been more clearly extended to all Commission members (paragraph 174(f)). Currently, it appears to only relate to the President and Human Rights Commissioner (the ‘appointed members’ under the AHRC Act).

Clause 173—Other terms and conditions

*Overview*

593.Clause 173 provides that a Commission member holds office on the terms and conditions (if any) in relation to matters not covered by this Act as are determined by the Governor-General.

*Previous provisions*

<b>New provision</b>	<b>Old provisions</b>
Clause 173	Subsection 37(4), AHRC Act
	Subsection 46D(2), AHRC Act
	Subsection 46MK, AHRC Act
	Subsection 30(3), RDA
	Subsection 97(3), SDA
	Subsection 114(2), DDA
	Subsection 53B(3), ADA

*Analysis*

594.No change has been made to the existing policy of this provision.

## **Part 6-3—How the Commission operates**

### **Division 1—Guide to this Part**

#### Clause 174—Guide to this Part

595.Division 1 provides a guide to Part 6-3 of the Bill.

### **Division 2—Role of President**

#### Clause 175—Role of the President

##### *Overview*

596.Clause 175 provides that the President is the senior member of the Commission and is responsible for managing the administrative affairs of the Commission.

##### *Previous provisions*

<b>New provision</b>	<b>Old provision</b>
Clause 175	Subsections 8A(2) and (3), AHRC Act

##### *Analysis*

597.No change has been made to the existing policy of this provision.

### **Division 3—Meetings of the Commission**

#### Clause 176—Convening meetings;

#### Clause 177—Presiding at meetings;

#### Clause 178—Quorum;

#### Clause 179—Voting at meetings;

#### Clause 180—Conduct at meetings;

#### Clause 181—Minutes;

#### Clause 182—Decisions without meetings

##### *Overview*

598.Clauses 176–182 provide for meetings of the Commission to be called by the President, and set out procedural rules for meetings.

*Previous provisions*

<b>New provision</b>	<b>Old provision</b>
Clause 176	Subsections 44(1)–(2), AHRC Act
Clause 177	Subsections 44(4)–(5), AHRC Act
Clause 178	Subsection 44(3), AHRC Act
Clause 179	Subsections 44(6)–(7), AHRC Act
Clause 180	Subsection 44(8), AHRC Act
Clause 181	Subsection 44(8), AHRC Act
Clause 182	New provision

*Analysis*

599. Clauses 176–182 substantially reproduce the rules in section 44 of the AHRC Act for the conduct of meetings of the Commission. A number of minor changes have been made to modernise practice, including:

- providing the President must convene a meeting if requested to do so by a majority of Commission members (subclause 176(4))
- requiring all Commission members to be provided with reasonable notice of meetings (subclause 176(5)), and
- providing a process for decisions of the Commission to be taken without meetings (clause 182).

**Division 4—Delegation**

Clause 183—Delegation of Commission’s functions and powers: general;

Clause 184—Delegation of Commission’s functions and powers: functions and powers that are to be performed by the President;

Clause 185—Delegation of Commission’s functions and powers: functions and powers that are to be performed by the Aboriginal and Torres Strait Islander Social Justice Commissioner;

Clause 186—Delegation of Commission’s functions and powers: functions and powers that are to be performed by the National Children’s Commissioner;

Clause 187—Delegation of the President’s functions and powers

*Overview*

600. Clause 183 provides for delegation of the Commission’s functions to members or staff of the Commission, or to another person who the Commission is satisfied is suitably qualified.

601. There are a small number of powers with differing delegation rules:

- The President's powers relating to complaints cannot be delegated to another Commission member (clause 184), and any delegation from the President is subject to directions from the President (subclauses 184(4) and 184(3)).
- Delegations by the Aboriginal and Torres Strait Islander Social Justice Commissioner and the National Children's Commissioner are subject to direction from those Commissioners (clauses 185 and 186).

*Previous provisions*

<b>New provision</b>	<b>Old provision</b>
Clauses 183–187	Section 19, AHRC Act

*Analysis*

602. No change has been made to the existing policy of this provision.

603. However, the provision clarifies that the Aboriginal and Torres Strait Islander Social Justice Commissioner and the National Children's Commissioner are able to delegate those functions of the Commission that are performed by them.

604. Delegations to 'another suitably qualified person' is to enable the Commission, if needed, to engage an external person, such as a barrister, to hear complaints where it is appropriate to do so (such as where the Commission is a party or may otherwise have perceptions of bias). While this rarely occurs, it is important to have the capacity to do this if needed.

## **Part 6-4—Other matters**

### **Division 1—Guide to this Part**

#### Clause 188—Guide to this Part

605. Division 1 provides a guide to Part 6-4.

### **Division 2—Staff**

#### Clause 189—Staff

*Overview*

606. Clause 189 provides that the staff of the Commission are to be engaged under the *Public Service Act 1999*.

607. It also provides that, for the purposes of the Public Service Act, the President and the Commission staff constitute a Statutory Agency, and the President is the Head of that Statutory Agency.

*Previous provisions*

<b>New provision</b>	<b>Old provision</b>
Clause 189	Section 43, AHRC Act

*Analysis*

608.No change has been made to the existing policy of this provision.

**Division 3—Planning and reporting obligations**

Clause 190—Corporate plan;

Clause 191—Annual report;

Clause 192—Reports given to Minister are to be tabled in Parliament

*Overview*

609.Clauses 190–191 provide for the Commission’s corporate planning and reporting responsibilities, including:

- the Commission’s corporate plan (clause 190), and
- the Commission’s annual report (clause 191).

610.Clause 192 provides that reports given by the Commission to the Minister must be tabled by the Minister in Parliament.

*Previous provisions*

<b>New provision</b>	<b>Old provision</b>
Clause 190	Sections 46AA, 46AB and 46AC, AHRC Act
Clause 191	Section 45, AHRC Act
Clause 192	Section 46, AHRC Act

*Analysis*

611.No change has been made to the existing policy of these provisions.

## **Division 4—Confidentiality**

Clause 193—Prohibition of unauthorised disclosure etc. of protected information and documents;

Clause 194—Authorised records and disclosures;

Clause 195—Disclosure to courts or tribunals

### *Overview*

612. Clauses 193–195 provide rules relating to confidentiality of information held by the Commission. They prohibit the unauthorised disclosure of information by Commission official, except in circumstances authorised under the Bill.

### *Previous provisions*

<b>New provision</b>	<b>Old provision</b>
Clauses 193–195	Section 49, AHRC Act

### *Analysis*

613. These provisions are intended to preserve the policy of the existing provisions in the AHRC Act on confidentiality of information. However, the drafting has been significantly modernised and clarified.

Clauses 196—Commission may give directions to preserve anonymity;

Clause 197—Commission may give directions to restrict publication

### *Overview*

614. Clause 196 provides the Commission with a power to direct non-disclosure of information to preserve the anonymity of another person who has made a complaint or who has otherwise dealt with the Commission (such as by making a submission), or on whose behalf that has occurred.

615. Subclause 196(3) makes it an offence, punishable by 10 penalty units, to fail to comply with a direction by the Commission under clause 196.

616. Clause 197 provides the Commission with a power to restrict the publication of information or documents provided to the Commission. Subclause 197(3) sets out a range of factors to consider in determining whether to make such a direction.

617. Subclause 197(5) makes it an offence, punishable by 10 penalty units, to fail to comply with a direction by the Commission under clause 197.

*Previous provisions*

<b>New provision</b>	<b>Old provision</b>
Clauses 196–197	Subsections 14(2)–(8), AHRC Act

*Analysis*

618. These provisions are intended to preserve the policy of the existing provisions in the AHRC Act on protecting confidentiality. The list of matters to which the Commission must have regard in assessing whether to restrict publication is based on the list in subsection 14(5) of the AHRC Act, although with some modernisation of drafting. Information which may be subject to legal professional privilege has been explicitly included (paragraph 197(3)(j)) to ensure that while the Commission can request and be provided with such information, it should not generally be published without express consent.

619. These offences are strict liability, maintaining the policy position from the AHRC Act.

620. Subclauses 196(4) and 197(6) are included to clarify that directions are not legislative instruments for the purposes of the *Legislative Instruments Act 2003*. These provisions are included to assist readers—the directions would not be legislative instruments within the meaning of section 5 of the *Legislative Instruments Act*.

Clause 198—Attorney-General’s certificate restricting requirements for information or documents

*Overview*

621. Clause 198 provides that the Attorney-General may issue a certificate certifying that the provision of information or documents, or confirming the existence or non-existence of such information or documents, pursuant to a notice issued by the Commission in the context of either a complaint or an inquiry, would be contrary to the public interest on one or more of a range of grounds provided.

622. Subclauses 198(2) and (4) provide that if the Attorney-General issues such a certificate, a requirement under notice to provide, or reveal the existence or non-existence of, the information or documents covered by the certificate is of no effect, and a person cannot be found criminally liable for failing to comply with such a notice.

*Previous provisions*

<b>New provision</b>	<b>Old provision</b>
Clause 198	Section 24, AHRC Act

*Analysis*

623. This provision is based on section 24 of the AHRC Act, which provides a power for the Attorney-General to issue such a certificate in relation to complaints and inquiries. There is no policy change to these provisions, other than to streamline the list of matters which may amount to disclosure not being in the public interest.

624. The offence for failing to comply with a notice (clause 201) provides that a court may stay proceedings for a prosecution of that offence if it is satisfied the Attorney-General has been asked to consider issuing a certificate, but has not yet made a decision.
625. The notes under subclauses 198(2) and (4) confirm that if a person wishes to rely on a certificate to avoid liability for failing to comply with a notice, that person bears the evidential burden of demonstrating that the certificate was issued and that it covered the matters in the notice.
626. Subclause 198(5) provides that a certificate is not a legislative instrument for the purposes of the *Legislative Instruments Act 2003*. This is included to assist readers—a certificate would not be a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act*.

Clause 199—Information or documents from an intelligence agency

*Overview*

627. Clause 199 provides that if a person is required, under a notice issued by the Commission, to provide information or documents that originated from an intelligence agency, the person must notify the intelligence agency immediately of the notice.

*Previous provisions*

New provision	Old provision
Clause 199	Subsections 21(2) and (3), AHRC Act

*Analysis*

628. This provision maintains the effect of subsections 21(2) and (3) of the AHRC Act (utilising the definition of ‘intelligence agency’ in clause 6 of the Bill to have the same meaning as in the *Inspector-General of Intelligence and Security Act 1986*).
629. The purpose of this provision is to enable the intelligence agency to determine whether the information or documents can be provided, or whether it wishes to request the Attorney-General to consider issuing a certificate certifying that release is not in the public interest. It is complemented by the inclusion in the offence provision regarding non-compliance with a notice (clause 201) that a court may stay proceedings for the prosecution of an offence if the Attorney-General is determining whether or not to issue a certificate.



## Chapter 7—Miscellaneous

### Part 7-1—Miscellaneous

#### Division 1—Guide to this Part

##### Clause 200—Guide to this Part

630. Division 1 provides a guide to Part 7-1 of the Bill.

#### Division 2—Offences related to the administration of the Act

##### Clause 201—Failure to comply with notice requiring the provision of information etc.

###### *Overview*

631. Clause 201 provides that it is an offence for a person to refuse or fail to comply with a notice requiring the provision of information or a document, or attendance to answer questions.

632. Subclause 201(2) provides that the offence does not apply if complying with the notice might tend to incriminate the person or expose them to a penalty.

633. Subclause 201(3) provides that a court may stay proceedings for an offence based on this clause where satisfied that the Attorney-General has been asked to give a certificate under clause 198, but has not yet decided to do so, and if a certificate were given the person could not be required to provide information or documents or answer questions.

###### *Previous provisions*

<b>New provision</b>	<b>Old provision</b>
Clause 201	Sections 23 and 46PM, AHRC Act

###### *Analysis*

634. This provision is intended to preserve the existing policy expressed in the AHRC Act, except for the following changes:

- Providing that the offence is one of strict liability. This is consistent with the approach to other offences in the Bill (see subclauses 196(3) and 197(5)). It is also consistent with the Guide to Framing Commonwealth Offences, as:
  - the offence is only punishable by a fine of 10 penalty units
  - it is likely to significantly enhance compliance with notices provided under the Bill, and
  - the person has been clearly put on notice of their obligations (namely, through the provision of a notice).
- Removing the defence of ‘reasonable excuse’, but including a specific defence relating to a response which might incriminate the person or expose them to a penalty

(maintaining the effect of subsections 23(3) and 46PM(3) of the AHRC Act). Removing the defence of ‘reasonable excuse’ is consistent with the Guide to Framing Commonwealth Criminal Offences, which provides that the general defences in the Criminal Code, such as those in Division 10 of Part 2.3 (including intervening conduct or event (section 10.1) and lawful authority (section 10.5)).

- Providing that a court may stay proceedings where a decision to give a certificate has not yet been made by the Attorney-General.

Clause 202—Failure to comply with notice requiring attendance at conference

*Overview*

635. Clause 202 provides that it is an offence if a person refuses or fails to comply with a notice requiring them to attend a conference.

*Previous provisions*

<b>New provision</b>	<b>Old provision</b>
Clause 202	Section 46PL, AHRC Act

*Analysis*

636. No change has been made to the existing policy of this provision, other than to remove the defence of ‘reasonable excuse’, for the same reasons as set out above.

**Division 3—Other miscellaneous provisions**

Clause 203—Compensation for acquisition of property

*Overview*

637. Clause 203 is designed to ensure that this Bill does not interfere with a person’s property rights in a way that contravenes section 51(xxxi) of the Constitution. It ensures that property is acquired on just terms.

638. The provision confers jurisdiction on a competent court to determine the amount compensation necessary to ensure the acquisition takes place on just terms.

*Previous provisions*

<b>New provision</b>	<b>Old provisions</b>
Clause 203	Sections 49C, AHRC Act
	Section 11, ADA
	Section 131, DDA

*Analysis*

639. This provision reflects existing policy, although a number of minor changes have been made to the provision to reflect current drafting practice for this kind of provision.

Clause 204—Protection of Commission etc. from civil liability

*Overview*

640. Clause 204 provides for the protection of the Commission and Commission officials from civil liability for, or in relation to, conduct engaged in good faith in the performance or exercise of their duties, function or powers.

*Previous provisions*

<b>New provision</b>	<b>Old provision</b>
Clause 204	Sections 48(1) and 48(2), AHRC Act

*Analysis*

641. No change has been made to the existing policy of this provision.

Clause 205—Protection of persons making complaints etc. from civil liability

*Overview*

642. Clause 205 provides for the protection of persons from civil liability for loss, damage or injury merely because a complaint or submission has been made to the Commission or information has been furnished to the Commission.

*Previous provisions*

<b>New provision</b>	<b>Old provision</b>
Clause 205	Subsection 48(3), AHRC Act

*Analysis*

643. No change has been made to the existing policy of this provision, except for the insertion of a requirement that the complaint be made ‘in good faith’, consistent with the approach taken in relation to victimisation (see clause 54).

Clause 206—No right of action except as expressly provided

*Overview*

644. Clause 206 provides that, except where expressly provided, a person does not have a right of action in relation to unlawful conduct or conduct that is an offence against a provision of this Bill.

*Previous provisions*

<b>New provision</b>	<b>Old provisions</b>
Clause 206	Sections 59, ADA
	Section 125, DDA
	Section 110, SDA

*Analysis*

645.No change has been made to the existing policy of this provision.

Clause 207—Commission may charge fees for certain matters

*Overview*

646.Clause 207 provides the Commission with the ability to charge a person or body fees for dealing with applications made under clauses 66 (reviewing policies or programs for compliance), 78 (compliance codes), 82 (special measure determinations) and 86 (temporary exemptions).

*Previous provisions*

647.None.

*Analysis*

648.This provision has been included to enable the Commission to fully recover its costs for the services it will be providing to applicants under Chapter 3. The rationale for this is the functions outlined above will generally benefit an individual organisation or discrete group of organisations. For this reason, the Commission’s costs of performing these functions should be borne by those beneficiaries.

649.However, there may be circumstances in which the Commission will not charge any individual organisation, such as the development of a compliance code of general application across the business sector (for example, a Small Business Code). In this case, the Government may choose to fund the Commission to develop such a code, rather than requiring any particular organisation or body to bear those costs on behalf of all small businesses.

650.Subclause 207(2) provides that the regulations may prescribe the rate of fees to be charged. This will give greater certainty to people who may wish to apply for these services regarding how much they might cost.

651.Subclause 207(3) puts beyond doubt that the imposition of a fee by the Commission does not constitute taxation.

Clause 208—Regulations

*Overview*

652.Clause 208 provides for the Governor-General to make regulations under the Bill.

*Previous provisions*

<b>New provision</b>	<b>Old provision</b>
Clause 208	Subsection 7(1), AHRC Act
	Section 61, ADA
	Section 132, DDA

	Section 47, RDA
	Section 116, SDA
	Section 50, AHRC

*Analysis*

653.No change has been made to the existing policy of this provision.



## APPENDIX A: APPROACH TO RECOMMENDATIONS OF SDA REPORT

### *Background*

In December 2008, the Senate Standing Committee on Legal and Constitutional Affairs presented its report on the *Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality*. The Committee made 43 recommendations relating to the Sex Discrimination Act (SDA).

In May 2010, the Government tabled its response to the Committee's report. Nine recommendations were accepted, in part or in full, for immediate implementation through amendments to the SDA. Of the remaining recommendations, 27 had implications for discrimination law more broadly and were noted for broader consideration in the context of the consolidation of anti-discrimination laws project.

On 24 May 2011, Parliament passed the *Sex and Age Discrimination Legislation Amendment Act 2011* (SADLA Act) to implement the accepted recommendations.

The outstanding recommendations have now either been accepted (in full, in part or in principle) or rejected as part of the development of the consolidated anti-discrimination law. The table below sets out the Government's position on each recommendation, including, where relevant, a reference to the clause(s) in the Human Rights and Anti-Discrimination Bill 2012 (HRAD Bill) which address the issue.

### *Summary*

#### **Initial Government response**

Recommendations accepted and implemented pre-consolidation	8 (plus 1 in part)
Recommendations noted and expressly referred to consolidation project	26 (plus 1 in part)
Recommendations otherwise noted	8
Recommendations rejected	0
<b>Total Recommendations</b>	<b>43</b>

#### **Final response**

Recommendations accepted	30 (3 in principle and 3 in part)
Recommendations noted	2
Recommendations rejected	11
<b>Total Recommendations</b>	<b>43</b>





*Government response to each recommendation*

<b>KEY:</b>	<b>ACCEPTED</b>	<b>ACCEPTED IN PART OR IN PRINCIPLE</b>	<b>REJECTED</b>
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#	Recommendation	Initial Government Response	Final Response	Location in HRAD Bill
1.	The committee recommends that the preamble to the Act and subsections 3(b), (ba) and (c) of the Act be amended by deleting the phrase ‘so far as is possible’.	Noted and referred to consolidation project	<b>Accepted</b> The phrase ‘so far as is possible’ is not included in the objects clause of the Bill, which applies to all protected attributes.	cl 3(1)
2.	The committee recommends that subsection 3(a) of the Act be amended to refer to other international conventions Australia has ratified which create obligations in relation to gender equality.	Noted and referred to consolidation project	<b>Accepted</b> One of the objects stated in the objects clause of the Bill is to give effect to Australia’s obligations under the seven core human rights treaties.	cl 3(1)(a), (b) cl 3(2), (3)
3.	The committee recommends that the Act be amended by inserting an express requirement that the Act be interpreted in accordance with relevant international conventions Australia has ratified including CEDAW, ICCPR, ICESCR and the ILO conventions which create obligations in relation to gender equality.	Noted and referred to consolidation project	<b>Accepted in principle</b> Objects clause refers to international human rights obligations and note in Bill refers to s 15AA of the Acts Interpretation Act, which prefers interpretation consistent with objects clause.	cl 3

#	Recommendation	Initial Government Response	Final Response	Location in HRAD Bill
4.	<p>In order to provide protection to same-sex couples from discrimination on the basis of their relationship status, the committee recommends that:</p> <ul style="list-style-type: none"> <li>- references in the Act to ‘marital status’ be replaced with ‘marital or relationship status’; and</li> <li>- the definition of ‘marital status’ in section 4 of the Act be replaced with a definition of ‘marital or relationship status’ which includes being the same-sex partner of another person.</li> </ul>	Noted – to consider further	<p><b>Accepted</b></p> <p>‘marital or relationship status’ is a protected attribute in the Bill and the definition is extended to include being the same-sex partner of another person.</p>	<p>cl 6 (definitions) ‘marital or relationship status’ cl 17(1)(h)</p>
5.	<p>The committee recommends that the definitions of direct discrimination in sections 5 to 7A of the Act be amended to remove the requirement for a comparator and replace this with a test of unfavourable treatment similar to that in paragraph 8(1)(a) of the <i>Discrimination Act 1991</i> (ACT)</p>	Noted and referred to consolidation project	<p><b>Accepted</b></p> <p>The Bill applies the detriment test, not the comparator. Under detriment test a person must demonstrate unfavourable treatment on the basis of the relevant attribute.</p>	cl 19

#	Recommendation	Initial Government Response	Final Response	Location in HRAD Bill
6.	The committee recommends that section 7B of the Act be amended to replace the reasonableness test in relation to indirect discrimination with a test requiring that the imposition of the condition, requirement or practice be legitimate and proportionate.	Noted and referred to consolidation project	<b>Accepted in principle</b> The Bill provides that conduct which is justifiable is not unlawful. Conduct is justifiable if done in good faith for a legitimate aim and is proportionate to that aim.	cl 19(3) cl 23 (justifiable conduct)
7.	The committee recommends that subsection 9(10) of the Act be amended to refer to ICCPR, ICESCR, and the ILO conventions which create obligations in relation to gender equality, as well as CEDAW, in order to ensure that the Act provides equal coverage to men and women.	Accepted – SADLA Act <sup>1</sup>	<b>Accepted</b> Retained in Bill.	cl 3(2), (3)
8.	The committee recommends that the Act be amended to include a general prohibition against sex discrimination and sexual harassment in any area of public life equivalent to section 9 of the <i>Racial Discrimination Act 1975</i> .	Noted and referred to consolidation project	<b>Accepted</b> Under the Bill, discrimination and harassment are unlawful in connection with any area of public life, consistent with section 9 of the Racial Discrimination Act.	cl 22 (discrimination) cl 50 (sexual harassment)
9.	The Committee recommends that the Act be amended to include a general equality before the law provision modelled on section 10 of the <i>Racial Discrimination Act 1975</i> .	Noted and referred to consolidation project	<b>Rejected</b> The right to ‘equality before the law’ is retained in relation to race only in the Bill.	cl 60

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<sup>1</sup> *Sex and Age Discrimination Legislation Amendment Act 2011*.

#	Recommendation	Initial Government Response	Final Response	Location in HRAD Bill
10.	The committee recommends that the Act be amended: a) to provide specific coverage to volunteers and independent contractors; and b) to apply to partnerships regardless of their size.	Noted and referred to consolidation project	<b>Accepted</b> As part of prohibiting discrimination in any area of public life, the Bill protects volunteers and unpaid workers from unlawful discrimination, and applies to all partnerships regardless of size.	cl 6 (definitions of 'employment' and 'work and work related areas') cl 22
11.	The committee recommends that subsection 12(1) of the Act be amended and section 13 repealed to ensure that the Crown in right of the states and state instrumentalities are comprehensively bound by the Act.	Noted and referred to consolidation project	<b>Accepted</b> The Bill wholly binds the States and Territories.	cl 15
12.	The committee recommends that the Act be amended to make breastfeeding a specific ground of discrimination.	Accepted – SADLA Act	<b>Accepted</b> Retained in Bill.	cl 17(1)(b)
13.	The committee recommends that the prohibition on discrimination on the grounds of family responsibilities under the Act be broadened to include indirect discrimination and discrimination in all areas of employment.	Accepted – SADLA Act	<b>Accepted</b> Retained in Bill. Indirect family responsibilities discrimination, which was included in the SADLA Bill as introduced by the Government but removed by Senate amendment, is included in the consolidated Bill.	cl 17(1)(d) cl 19(3) cl 22(3)(a)
14.	The committee recommends that the Act be amended to impose a positive duty on employers to reasonably accommodate requests by employees for flexible working arrangements, to accommodate family or carer responsibilities, modelled on section 14A of the <i>Equal Opportunity Act 1995 (Vic)</i> .	Noted	<b>Rejected</b> The duty to make reasonable adjustments only applies to disability in the Bill.	cl 23(6) cl 24(6) cl 25

#	Recommendation	Initial Government Response	Final Response	Location in HRAD Bill
15.	The committee recommends that the definition of sexual harassment in section 28A of the Act be amended to provide that sexual harassment occurs if a reasonable person would have anticipated the <i>possibility</i> that the person harassed would be offended, humiliated or intimidated.	Accepted – SADLA Act	<b>Accepted</b> Retained in Bill.	cl 49(1)
16.	The committee recommends that section 28A of the Act be amended to provide that the circumstances relevant to determining whether a reasonable person would have anticipated the possibility that the other person would be offended, humiliated or intimidated by the conduct include: - the sex, age and race of the other person; - any impairment that the other person has; - the relationship between the other person and the person engaging in the conduct; and - any other circumstance of the other person.	Accepted – SADLA Act	<b>Accepted</b> Retained in Bill.	cl 49(2)
17.	The committee recommends that section 28F of the Act be amended to: - provide protection to students from sexual harassment regardless of their age; and - remove the requirement that the person responsible for the harassment must be at the same educational institution as the victim of the harassment.	Accepted – SADLA Act	<b>Accepted</b> Retained in Bill (by prohibiting sexual harassment in ‘any area of public life’).	cl 50
18.	The committee recommends that the Act be amended to protect workers from sexual harassment by customers, clients and other persons with whom they come into contact in connection with their employment.	Accepted – SADLA Act	<b>Accepted</b> Retained in Bill (by prohibiting sexual harassment in ‘any area of public life’).	cl 50

#	Recommendation	Initial Government Response	Final Response	Location in HRAD Bill
19.	The committee recommends that the HREOC Act <sup>2</sup> should be amended to provide that, where a complaint is based on different grounds of discrimination covered by separate federal anti-discrimination legislation, then HREOC or the court must consider joining the complaints under the relevant pieces of legislation. In so doing, HREOC or the court must consider the interrelation of the complaints and accord an appropriate remedy if the discrimination is substantiated.	Noted (already occurs)	<b>Accepted</b> This practice already occurs and is explicitly maintained in the Bill. In addition, Bill contains explicit coverage of discrimination on a combination of attributes.	cl 19(1), (3) cl 105(2)
20.	The committee recommends that subsection 46PO(1) of the HREOC Act be amended to make the standing requirements for lodging an application with the Federal Court or the Federal Magistrates Court consistent with the requirements for lodging a complaint with HREOC as set out in subsection 46P(2) of the HREOC Act.	Noted and referred to consolidation project	<b>Rejected</b> The Bill does not permit representative bodies to lodge complaints with the courts if conciliation by the Commission is unsuccessful.	cl 89 cl 122
21.	The committee recommends that subsection 46PO(2) of the HREOC Act be amended to increase the time limit for lodging an application with the Federal Court or Federal Magistrates Court from 28 days after termination of the complaint to 60 days.	Accepted – DDOHRLA	<b>Accepted</b> Retained in Bill.	cl 123

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<sup>2</sup> The *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (DDOHLRA) changed the name of the *Human Rights and Equal Opportunity Commission Act 1986* to the *Australian Human Rights Commission Act 1986*. The legislation also changed the name of the Commission to the Australian Human Rights Commission.

#	Recommendation	Initial Government Response	Final Response	Location in HRAD Bill
22.	The committee recommends that a provision be inserted in the Act in similar terms to section 63A of the <i>Sex Discrimination Act 1975 (UK)</i> so that, where the complainant proves facts from which the court could conclude, in the absence of an adequate explanation, that the respondent discriminated against the complainant, the court must uphold the complaint unless the respondent proves that he or she did not discriminate.	Noted and referred to consolidation project	<b>Accepted</b> The Bill includes a shifting burden of proof modelled on the UK approach.	cl 124
23.	The committee recommends that the remedies available under subsection 46PO(4) of the HREOC Act where a court determines discrimination has occurred be expanded to include corrective and preventative orders.	Noted and referred to consolidation project	<b>Accepted</b> The Bill includes these remedies in the list of available remedies, while retaining the discretion for a court to order any remedy as it considers appropriate.	cl 125
24.	The committee recommends that increased funding be provided to the working women's centres, community legal centres, specialist low cost legal services and legal aid to ensure they have the resources to provide advice for sex discrimination and sexual harassment matters.	Noted	<b>Noted</b> No change to initial response.	N/A
25.	The committee recommends that the Act be amended to remove the exemption for voluntary organisations in section 39.	Noted and referred to consolidation project	<b>Accepted</b> The Bill does not include an exemption for voluntary organisations as part of broader coverage to any area of public life.	cl 22

#	Recommendation	Initial Government Response	Final Response	Location in HRAD Bill
26.	The committee recommends that the definition of ‘clubs’ in section 4 be expanded so that: a) the prohibition on discrimination with respect to clubs applies to a broader range of organisations; and -b) those organisations have access to the automatic exception in subsection 25(3) permitting single-sex clubs.	Noted and referred to consolidation project	<b>Accepted</b> The Bill applies to associations (incorporated and unincorporated) that provide and maintain facilities from the funds of the association. It retains a specific exception for single-sex clubs.	cl 6 (definitions) ‘club or member-based association’ cl 35(3) (exception)
27.	The committee recommends that provisions such as sections 31 and 32, which clarify that certain differential treatment is not discriminatory, should be removed from Part II Division 4 which deals with exemptions and instead be consolidated with section 7D.	Noted and referred to consolidation project	<b>Accepted</b> These exceptions are not expressly included in the Bill as the conduct would be a special measure to achieve equality, or justifiable conduct, under the Bill.	cl 21 (special measures) cl 23 (justifiable conduct)
28.	The committee recommends that section 44 of the Act be amended to clarify that the power of HREOC to grant temporary exemptions is to be exercised in accordance with the objects of the Act.	Noted (already occurs)	<b>Accepted</b> The Bill makes it clearer that the grant of temporary exemptions by the Commission must be exercised in accordance with the objects of the Bill.	cl 84(2)
29.	The committee recommends that the Act and the HREOC Act should be amended to expand HREOC’s powers to conduct formal inquiries into issues relevant to eliminating sex discrimination and promoting gender equality and, in particular, to permit inquiries which examine matters within a state or under state laws.	Noted and referred to consolidation project	<b>Rejected</b> Under the Bill, human rights inquiries may only be made in relation to Commonwealth activities, maintaining the status quo.	cl 135



#	Recommendation	Initial Government Response	Final Response	Location in HRAD Bill
30.	The committee recommends that paragraph 48(1)(gb) of the Act be amended to explicitly confer a function on HREOC of intervening in proceedings relating to family responsibilities discrimination or victimisation	(Family responsibilities) – partially accepted – SADLA Act (Victimisation) – noted and referred to consolidation project	<b>Accepted</b> The Bill contains a single provision permitting Commission to intervene or act as amicus in any matter raising human rights or discrimination issues with leave of the court. This includes both family responsibilities and victimisation proceedings.	cl 146(f)
31.	The committee recommends that subsection 46PV(1) of the HREOC Act be amended to include a function for the special purpose commissioners to appear as amicus curiae in appeals from discrimination decisions made by the Federal Court and the Federal Magistrates Court.	Noted and referred to consolidation project	<b>Accepted</b> The Bill clarifies that the Commission may intervene or act as amicus in any matter, including appeals, raising human rights or discrimination issues with leave of court.	cl 146(f)
32.	The committee recommends that paragraph 48(1)(gb) of the Act and subsection 46PV(2) of the HREOC Act be amended to empower HREOC to intervene in proceedings, and the special purpose commissioners to act as amicus curiae, as of right	Noted and referred to consolidation project	<b>Rejected</b> The Bill does not permit intervention by the Commission without leave of the court.	cl 146(f)

#	Recommendation	Initial Government Response	Final Response	Location in HRAD Bill
33.	The committee recommends that the Act be amended to require the Sex Discrimination Commissioner to monitor progress towards eliminating sex discrimination and achieving gender equality, and to report to Parliament every four years	Noted and referred to consolidation project	<p><b>Rejected</b></p> <p>The Bill does not include a mandatory requirement for a periodic report from the Sex Discrimination Commissioner. However, the Commission may provide a report to the Minister at any time on any aspect of its functions.</p> <p>In addition, the Equal Opportunity for Women in the Workplace Amendment Bill 2011 (EOWWA Bill) provides for the (to-be-renamed) Workplace Gender Equality Agency to submit to the Minister a report on the progress achieved in relation to the gender equality indicators every two years.</p>	cl 150
34.	<p>The committee recommends that HREOC be provided with additional resources to enable it to:</p> <ul style="list-style-type: none"> <li>- carry out an initial public education campaign in relation to changes to the Act;</li> <li>- perform the additional roles and broader functions recommended in this report; and</li> <li>- devote additional resources to its functions to educate the public about the Act.</li> </ul>	Noted	<p><b>Noted</b></p> <p>No change to initial response.</p>	N/A

#	Recommendation	Initial Government Response	Final Response	Location in HRAD Bill
35.	<p>The committee recommends that further consideration be given to reviewing the operation of section 38 of the Act, to:</p> <ul style="list-style-type: none"> <li>- retain the exemption in relation to discrimination on the basis of marital status; and</li> <li>- remove the exemption in relation to discrimination on the grounds of sex and pregnancy; and</li> <li>- require a test of reasonableness.</li> </ul>	Noted and referred to consolidation project	<p><b>Accepted in part</b></p> <p>The Bill retains a specific exemption in relation to discrimination on the basis of marital status and pregnancy. The exemption in relation to sex is removed.</p> <p>There are already objective elements to the religious exemptions (ie conduct which ‘conforms’ to doctrines or tenets or ‘necessary’ to avoid injury to religious sensitivities). No further reasonableness test is included.</p>	cl 33(1), (4)
36.	The committee recommends that further consideration be given to removing the existing permanent exemptions in section 30 and sections 34 to 43 of the Act and replacing these exemptions with a general limitations clause	Noted and referred to consolidation project	<p><b>Accepted in part</b></p> <p>The Bill contains a general limitation for conduct which is justifiable.</p> <p>Some exceptions are removed from the Bill, but others are retained where these provide additional guidance (eg inherent requirements of a job; religious exemptions; provision of insurance, superannuation or credit).</p> <p>All exceptions will be subject to a review after three years of operation.</p>	cl 23 (justifiable) ss 26–44 (specific exceptions) cl 47 (review of exceptions)

#	Recommendation	Initial Government Response	Final Response	Location in HRAD Bill
37.	The committee recommends that further consideration be given to amending the Act to give the Sex Discrimination Commissioner the power to investigate alleged breaches of the Act, without requiring an individual complaint	Noted and referred to consolidation project	<b>Rejected</b> Under the Bill, the Commission has no power to conduct investigations into issues of systemic discrimination without an individual complaint.	cl 89 (who may complain to the Commission)
38.	The committee recommends that further consideration be given to amending the Act to give HREOC the power to commence legal action in the Federal Magistrates Court or Federal Court for a breach of the Act	Noted and referred to consolidation project	<b>Rejected</b> Under the Bill, the Commission does not have the power to commence legal action in the Federal Magistrates Court or Federal Court without an individual complaint.	cl 122 (who may apply to court)
39.	The committee recommends that further consideration be given to expanding the powers of HREOC to include the promulgation of legally binding standards under the Act equivalent to the powers exercised by the Minister under section 31 of the <i>Disability Discrimination Act 1992</i> .	Noted and referred to consolidation project	<b>Rejected</b> The Bill does not extend the power to make binding standards beyond disability.	ss 70–74 (disability standards)

#	Recommendation	Initial Government Response	Final Response	Location in HRAD Bill
40.	The committee recommends that further consideration be given to amending the Act or the EOWW Act to provide for positive duties for public sector organisations, employers, educational institutions and other service providers to eliminate sex discrimination and sexual harassment, and promote gender equality	Noted – to be considered further in the context of the EOWWA review	<b>Rejected</b> There is no new positive duty on organisations to eliminate unlawful discrimination in the Bill and the EOWW Act will continue to require all non-public sector organisations with 100 or more employees to report annually on gender equality in the workplace. However, the EOWWA Bill requires the Minister to set minimum standards in relation to the gender equality indicators and, if an employer fails to meet a minimum standard and fails to show improvement over a two year period, this may constitute a failure to comply with that Act.	N/A
41.	The committee recommends that further consideration be given to the relationship between the Act and the EOWW Act, in particular, whether: - the obligations under the EOWW Act and should be incorporated within the Act; and - the functions of EOWA and HREOC should be combined.	Noted – to be considered further in the context of the EOWWA review	<b>Rejected</b> The separate roles and purposes of the EOWW Act and anti-discrimination law are distinct and well understood within the community and therefore will remain separate.	N/A

#	Recommendation	Initial Government Response	Final Response	Location in HRAD Bill
42.	The committee recommends that the Attorney-General's Department conduct consultations regarding the further possible changes to the Act outlined in recommendations 35 to 41 and report publicly on the outcomes of that consultation within 12 months	Noted and referred to consolidation project	<b>Accepted in principle</b> The Attorney-General's Department undertook extensive consultations regarding the consolidation project, including in relation to each of the recommendations made by the Committee.	N/A
43.	The committee recommends that HREOC conduct a public inquiry to examine the merits of replacing the existing federal anti-discrimination acts with a single Equality Act. The inquiry should report by 2011 and should also consider: - what additional grounds of discrimination, such as sexual orientation or gender identity, should be prohibited under Commonwealth law; - whether the model for enforcement of anti-discrimination laws should be changed; and - what additional mechanisms Commonwealth law should adopt in order to most effectively promote equality.	Noted and referred to consolidation project	<b>Accepted in part</b> The Attorney-General's Department, rather than the Commission, undertook extensive consultations as part of the consolidation project. - The Bill introduces sexual orientation and gender identity as additional grounds of discrimination. - Although the enforcement model remains primarily one of individual complaints, a range of improvements have been made to streamline this process. - There are a range of mechanisms to assist organisations to understand their obligations, assisting to achieve the objects of the Bill.	N/A





**Australian Government**  
**Attorney-General's Department**